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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 45

RAYONIER INCORPORATED, A CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The United States District Court for the Western District of Washington, Northern Division, rendered no opinion. The opinion of the United States Court of Appeals for the Ninth Circuit (R. 79–89) is reported at 225 F. 2d 642.

JURISDICTION

The judgment of the Court of Appeals was entered on September 1, 1955 (R. 90). A petition for rehearing *en banc* was denied on October 14, 1955 (R. 90). On December 27, 1955, leave was granted to file a second petition for rehearing (R. 91). On January

10, 1956, the time for filing a petition for a writ of certiorari was extended by order of Mr. Justice Douglas to and including March 12, 1956 (R. 125). On February 17, 1956, the second petition for hearing was denied (R. 125). The petition for a writ of certiorari was filed on March 9, 1956, and was granted on April 23, 1956 (R. 126). 351 U. S. 905. The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, under Washington law, the owner of the servient estate in a railroad right-of-way is under a duty to keep the right-of-way free of combustible matter or to guard against the improper use of the right-of-way by the railroad.

2. Whether, under Washington law, the alleged presence of combustible matter at the point of origin of the forest fire was the proximate cause of the damage.

3. Whether the United States is liable, under the Federal Tort Claims Act, on a claim for the allegedly negligent failure of the Forest Service to fight and extinguish a forest fire originating on a railroad right-of-way and spreading to neighboring public and private lands.

STATUTE INVOLVED

The relevant provisions of the Federal Tort Claims Act[1] and of the Revised Code of Washington are set forth in the Appendix, pp. 79–81, *infra*.

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[1] The Federal Tort Claims Act was enacted as Title IV of the Legislative Reorganization Act of 1946, 60 Stat. 842, 28 U. S. C. 921, *et seq.* While subsequently repealed, its provisions were re-

STATEMENT

This is an action under the Federal Tort Claims Act to recover damages for property loss allegedly sustained as a result of a forest fire caused by a passing train of the Port Angeles Western Railroad and originating on the Railroad's right-of-way running through a national forest. The forest fire thereafter spread to neighboring public and private lands. The complaint asserts negligence on the part of the Government:

> (1) in failing to require the Railroad to provide adequate spark arresters on its locomotives and to require the Railroad to follow-up its trains with speeders or other equipment with men to watch for fires caused by trains;
>
> (2) in failing to require the Railroad to keep its right-of-way clear of inflammable materials; and
>
> (3) in failing to extinguish the fires by utilizing insufficient manpower, tools, equipment, water, and supplies before the forest fire reached petitioner's property.

Both courts below held that petitioner's amended complaint failed to state a cause of action. The allegations of the complaint and the proceedings below may be summarized as follows:

1. *Allegations of fact in the amended complaint.* Petitioner is a Delaware corporation authorized to do

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enacted into law, under the revision of the Judicial Code, as 28 U. S. C. 1291, 1346, 1402, 1504, 2110, 2402, 2411, 2412, 2671–2680, effective September 1, 1948 (62 Stat. 869, 992). Except for insignificant alterations in the language, the portions of the Act relevant to the instant suit remained unchanged

business in the State of Washington (R. 3–4). Its principal business is the manufacture of pulp and, in connection therewith, it owns extensive timber lands in the State of Washington as well as sundry facilities and equipment for use in logging operations (R. 4–5). Also, at the times relevant to this action, it was a party to two so-called "Timber Sales Contracts" with the Forest Service of the Department of Agriculture, under the terms of which it had the right and obligation to purchase and cut certain timber on public lands (R. 5). On September 20, 1951, there remained uncut timber which petitioner had the right and obligation to purchase under these contracts (R. 5).

The Olympic National Forest contains extensive timber lands, some of which are adjacent to or in the general vicinity of lands owned by petitioner (R. 5–6). These Government lands are administered by the Forest Service and a portion of the timber thereon is sold to private parties for commercial and industrial purposes (R. 6).

By agreement between the Forest Service and the State of Washington, a "Forest Service Protective Area" was established, embracing *inter alia* petitioner's lands and the above-mentioned Government lands (R. 6). The Forest Service agreed to protect the land within this area against fire and to take action in suppressing fires originating on or threatening the area (R. 6–7). Petitioner and other adjacent landowners were aware of the establishment of the Forest Service Protective Area and of the duties of the Forest Service pertaining thereto (R. 7).

The District Ranger of the Forest Service for the district in which this Forest Service Protective Area was located was Sanford Floe (R. 8). In the performance of their duties, Floe and his subordinates were supposed to inspect and patrol the lands within the Protective Area to discover, abate, and eliminate conditions which constituted fire hazards (R. 9). Further, when a fire occurred, they were supposed to supervise, direct, and control its suppression (R. 9). Floe was authorized to employ, rent, and use all men, equipment, tools, and materials he deemed necessary to accomplish these ends (R. 9). Also, he and his subordinates were fire wardens of the State of Washington and in such capacity had the authority to impress help in the prevention, suppression, and control of forest fires (R. 9–10).

It is further alleged that during 1951, and for several years prior thereto, the Port Angeles Western Railroad possessed a right-of-way across the public domain (R. 11). The locomotives and other equipment operated by the Railroad on the right-of-way were defective without adequate spark arresters, with the result that they emitted sparks (R. 11). The Railroad had also permitted its right-of-way to become covered with inflammable growing grasses and bushes and many of its track ties were rotten (R. 11–12). These conditions were, or should have been, known to Floe and could have been, but were not, abated by him prior to August 6, 1951 (R. 12). Floe had called to the Railroad's attention, however, its use of defective equipment and its failure to observe prescribed

fire prevention practices, and had requested the Railroad to correct those conditions (R. 12).

At approximately noon on August 6, 1951, sparks from a Port Angeles Western Railroad train crossing the public domain started fires on and in the vicinity of the right-of-way (R. 12). Shortly thereafter, Floe was notified of the fires, whereupon he and his subordinates immediately assumed exclusive supervision and control of the efforts to suppress them (R. 13–14). Petitioner knew that this supervision had been undertaken and relied upon its being continued (R. 14).

Between August 7 and August 11, 1951, the fires spread over approximately 1,600 acres of land (R. 15). By the latter date, it was brought under control and thereafter remained contained within the 1,600 acre area until the morning of September 20, 1951 (R. 15). During this period, the fire and all burning material could have been completely extinguished had Floe employed more available men and equipment (R. 25). On September 20, 1951, a northeasterly wind of not unusual force carried sparks and other burning matter from within the area to lands to the west and south (R. 24). New fires started and spread rapidly in various directions, destroying or damaging facilities of petitioner and timber on the public domain which petitioner was entitled to cut under its Timber Sales Contracts with the Forest Service (R. 24, 30–31).

It is alleged that the spread of the fire on September 20, as well as the resultant damage to petitioner's

property, was attributable to the negligence of Floe and his subordinates in the conduct of their fire-fighting activities (R. 29). In broad outline, this negligence consisted of the failure at various stages to dispatch and utilize sufficient men and equipment at their disposal; the failure to maintain proper fire patrols and look-outs; the failure to take appropriate action in the light of weather conditions and weather forecasts; the failure to discover and extinguish between August 11, 1951, and September 19, 1951, all fires and burning matter in the 1,600 acre area; and the failure to carry out a Fire Suppression Plan which previously had been adopted by the Supervisor of the Olympic National Forest (R. 27–29).

2. *Proceedings in the courts below.* On February 19, 1954, the amended complaint was filed (R. 3–35). On February 27, 1954, the United States made an oral motion to dismiss the complaint on the grounds that it failed to state a cause of action and that the District Court lacked jurisdiction over the subject matter (R. 48–49). After a hearing (R. 48–65), the District Court granted the motion on the former ground and, on March 1, 1954, an order was entered dismissing the cause with prejudice (R. 66–67).

The Court of Appeals affirmed. With respect to the alleged failure of the Forest Service to keep the railroad right-of-way clear of inflammable matter, the court held (1) this was not the proximate cause of the damage complained of (R. 80–81), and (2) assuming the truth of petitioner's allegations, the Government was not guilty of actionable negligence

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(R. 84–87). With respect to the alleged negligence of the Forest Service in fighting the fire, the court determined (1) the Forest Service was acting in the capacity of a public fireman, and (2) as a consequence, the claim was barred by this Court's holding in *Dalehite* v. *United States,* 346 U. S. 15, 43–44 (R. 82–84).

SUMMARY OF ARGUMENT

In this action petitioner endeavors to invoke the Tort Claims Act to recover damages for property loss which it allegedly sustained as a result of a forest fire in the Olympic National Forest. This fire was concededly started by a negligently operated locomotive of a privately owned Railroad, while the locomotive was proceeding on the Railroad's improperly maintained right-of-way across the National Forest. The fire was fought on the private and public lands, to which it then spread, by the Forest Service of the Department of Agriculture pursuant to a cooperative fire protection agreement which the Service had entered into with the State of Washington. The District Court and the Court of Appeals, relying upon traditional tort principles and the decision of this Court in *Dalehite* v. *United States,* 346 U. S. 15, held that petitioner's complaint does not state a cause of action against the United States. This holding, we submit, is wholly correct.

I

A. Pointing to the assertion in the complaint that, at the place of origin of the fire on the Railroad right-

of-way, the right-of-way crossed the public domain, petitioner contends that the United States was under a landowner's duty to keep the right-of-way free from combustible matter and to require the Railroad to observe customary safety precautions in operation of its trains thereon. From its premise of the existence of such a duty, petitioner proceeds to the conclusion that the Government is to be held responsible to it for the Railroad's derelictions which occasioned the fire.

This reasoning is based on a total misunderstanding of the nature of the Railroad's interest in its right-of-way and the legal duties concomitant with that interest. The Railroad possessed at least an easement in the right-of-way. Consequently, any common law or statutory obligation to maintain the right-of-way in such fashion as to avoid damage to others rested upon it alone and not, as petitioner asserts, upon the United States—which, as to the surface, possessed nothing more than a reversionary interest on cessation of use of the premises for railroad purposes. This follows from the long standing principle, accepted universally, that, in the absence of a contractual stipulation to the contrary (and here there was none), the holder of the servient estate in an easement is under no obligation to third parties to maintain the easement in good condition. This rule, the force of which in the State of Washington has not been altered or affected to any extent by the legislative enactments upon which petitioner relies, is fully applicable to railroad easements. There is not a single decision in any jurisdiction imposing liability upon

the owner of the fee title in the ground beneath a right-of-way for damage resulting from the failure of the railroad either to remove combustibles from the surface or to operate its trains safely.

The court below correctly held that the fact that the United States allegedly reserved the right to enter upon the right-of-way, and to require the Railroad to remove combustibles therefrom, does not provide an exception to the settled rule. This reservation was admittedly not coupled with an undertaking by the Government to abate fire hazards or even to assume a duty of inspection of the right-of-way. Rather, its effect was simply to afford the Government, for its own benefit, the opportunity to ascertain the manner in which the Railroad conducted its affairs on the easement. As such, petitioner can not claim the benefit of the reservation; if petitioner has been damaged because of the condition or use made of the right-of-way by the Railroad, it still must look solely to the Railroad for redress.

B. Petitioner's assertion that liability may be imposed upon the United States because of the asserted presence of combustibles on the public domain adjoining the right-of-way is similarly without substance. A landowner owes no duty to conform the use of his property to the possibility that some act of negligence on the part of a third person will start a fire on adjoining land which is in the possession, and thus is the responsibility, of that third person. This principle, too, has been applied consistently in cases involving, as does this one, fires which are started by rail-

road locomotives and then spread to neighboring lands on which combustible matter is present. And no Washington statute, either by its terms or as judicially construed, has the effect of modifying the common law in this respect.

C. Apart from the fact that the purported presence of combustibles on and about the right-of-way did not constitute a breach of any duty owing this petitioner by the United States, these combustibles were not the proximate cause of the damage. According to the complaint, the fire was contained within a 1,600 acre area for over one month following its ignition on the right-of-way. The loss to petitioner resulted only when, assertedly due to the negligent failure of the Forest Service to suppress the fire while thus contained, it thereafter spread to petitioner's property. Moreover, with regard to the alleged slashings on the public domain, it is nowhere asserted in the complaint that any fires originated in these slashings or that they had any effect whatsoever upon the spread of the fire.

II

Petitioner advances as an additional basis for recovery the alleged failure of the Forest Service to fight the fire properly. In *Dalehite* v. *United States,* 346 U. S. 15, this Court held that claims of this character are not cognizable under the Tort Claims Act. The *Dalehite* holding represents a correct interpretation of the Act and traditional tort law and is controlling here.

A. As the court below determined, the endeavors of the Forest Service to extinguish the fire on public and private lands alike, after it had originated on the right-of-way, was undertaken in the capacity of a public fireman—and not, as petitioner suggests, in pursuance of a special duty imposed upon landowners under local law. For one thing, petitioner's complaint itself notes that the fire fighting activities of the Forest Service were conducted under a cooperative agreement with the State of Washington. By this agreement, the Service assumed the task of suppressing fires on all lands within a particular area (whether federally owned or not) and, in the furtherance of this end, its rangers were clothed with the duties and privileges of state forest wardens, including the right to conscript and impress men and equipment for fire suppression. Undertakings of this kind are a part of the participation of the Forest Service, under express Congressional authorization, in the nationwide effort of Federal, state, and local authorities to prevent and suppress forest fires.

Secondly, in Washington, as elsewhere, the courts have continually emphasized that the special common law and statutory fire fighting duties imposed upon the landowner, to which petitioner makes reference, are confined to situations where the fire originates on his own land. And, in the application of this limitation, it is accepted that a railroad right-of-way is the property of the railroad. While there are innumerable cases holding railroads liable for the failure to prevent the spread of a fire developing on their rights-of-way.

there has never been a single occasion in which the adjoining landowner has been held similarly accountable.

B. 1. In *Dalehite* v. *United States,* 346 U. S. 15, this Court held that, under the Tort Claims Act, the United States is not liable for claims grounded upon the alleged failure of public firemen to extinguish a fire. Observing that the "Act did not create new causes of action where none existed before", the Court applied the "normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights".

2. It is clear, as this Court ruled in *Dalehite,* that to hold actionable under the Tort Act the alleged failure of public firefighters to extinguish a fire which was not started by Government employees—or on Government property—would be to visit the United States with a novel and unprecedented liability. Every American decision on this question is to the effect that claims based upon such a failure are not cognizable. Additionally, there has been a similar uniform rejection of claims rooted in the assertedly negligent failure of a city to perform its assumed duty of providing sufficient water for fire protection. And, petitioner to the contrary notwithstanding, these decisions do not rest upon considerations of sovereign immunity. Rather, underlying the vast majority of them is the recognition that fire protection is provided as an incident of government for the benefit of the public as a whole and, as a consequence, does not give rise to actionable rights in individual members of

the public who may deem themselves to have been aggrieved by the failure of the undertaking to accomplish fully its intended objective.

3. Further indication that the fire fighting holding in *Dalehite* did not rest upon principles of sovereign immunity, and at the same time the complete answer to petitioner's argument that tort liability may be imposed upon the United States because of the contract between the Forest Service and the State of Washington, is found in the cases dealing with the liability of *private* water companies for fire loss allegedly stemming from their negligent failure to perform properly their contracts with municipalities to furnish water for fire protection. These companies have never enjoyed sovereign immunity to any extent. Yet in all but three jurisdictions, where liability is imposed on a contractual basis, they are held not accountable for such loss to individual citizens. The decision of this Court in *German Alliance Insurance Co.* v. *Home Water Supply Co.*, 226 U. S. 220, and that of the New York Court of Appeals in *Moch* v. *Rensselaer Water Co.*, 247 N. Y. 160, indicate that the basic reason is little different from that at the foundation of the rule barring suits against municipalities—namely that, while by its contract with the city to provide some of the means for fire protection the water company assumes an obligation to the citizenry as a whole, it does not incur at the same time an actionable duty to individual members thereof. In the *Moch* case, Judge Cardozo expressly rejected the application to such situations of the "good Samaritan" principle, which he had previously laid down in *Glanzer* v. *Shepard*, 223 N. Y. 236.

4. Still further evidence that the long-standing rule referred to by the Court in *Dalehite* is grounded upon considerations far removed from sovereign immunity is contained in the New York decisions in this area since the enactment of the Court of Claims Act of that State in 1929. By that Act, New York waived its immunity in tort and subjected itself and its political subdivisions to the same liability as is imposed on private individuals for their negligent acts or omissions. But, as is reflected by *Hughes* v. *State,* 252 App. Div. 263, and *Steitz* v. *City of Beacon,* 295 N. Y. 51, both of which were decided subsequent to 1929, it is still settled law in New York that the alleged failure of a public fireman to extinguish a fire not originated by a public body does not give rise to private actionable rights.

5. Petitioner's reliance on *Indian Towing Co.* v. *United States,* 350 U. S. 61, is misplaced. In that case, this Court decided that a claim grounded upon alleged negligence in the maintenance of a Coast Guard navigational aid was within the purview of the Tort Act, noting that "it is hornbook tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good Samaritan' task in a careful manner". In so holding, however, the Court did not purport to disturb *Dalehite;* to the contrary, *Dalehite* was expressly distinguished on the ground that it involved a claim based on negligence in connection with fire fighting. The basis for this distinction, and thus the error in petitioner's contention that the United States is liable here as a volunteer, is plain. In addition to Judge Cardozo's explicit rejection of the "good Samaritan"

principle in the *Moch* case, there was perforce the same recognition of the inapplicability of the principle in the other cases which, without dissent, hold that neither governmental bodies nor private persons undertaking by contract (or otherwise) to furnish some facet of fire protection are liable as volunteers to members of the public for the imperfect fulfillment of that undertaking. In the final analysis, petitioner asks this Court to hold that the Tort Claims Act does much more than waive the prior sovereign immunity in tort—that it also involves the assumption by the Government of actionable fire protection and suppression duties and liabilities which, both as to governmental units and private individuals, are completely unknown in American jurisprudence.

ARGUMENT

By this action, petitioner seeks to impose liability upon the United States under the Tort Claims Act for alleged damage arising from a forest fire which (1) concededly was set by a negligently operated Port Angeles Western Railroad locomotive on the Railroad's negligently maintained right-of-way across the Olympic National Forest, and (2) was fought by the Forest Service on private and public lands alike. Both courts below have held that petitioner's claim fails to state a cause of action against the United States. We submit that this conclusion—viewed in terms of the statutory and common law duties of a private landowner in the State of Washington and of the Government's waiver of immunity from suit in the Tort Claims Act—is entirely correct.

For convenience, we treat petitioner's claim in the two separate parts into which it falls: (1) the Gov-

ernment's alleged liability for the presence of combustible material on and near the Railroad's right-of-way, and (2) the Government's alleged liability for the negligence of the Forest Service in fighting the fire.

I

UNDER WASHINGTON LAW, THE UNITED STATES IS NOT LIABLE TO PETITIONER FOR THE ALLEGED PRESENCE OF COMBUSTIBLE MATTER ON AND IN THE VICINITY OF THE RAILROAD RIGHT-OF-WAY

A. THE DUTY OF MAINTAINING THE RIGHT-OF-WAY RESTED SOLELY UPON THE RAILROAD

It is not disputed that the forest fire occasioning the damage of which petitioner complains was caused by the ignition of combustible material on the right-of-way maintained by the Port Angeles Western Railroad across the Olympic National Forest.[16] It is also unchallenged that the ignition resulted from a spark from a steam locomotive owned and operated by the Railroad. Petitioner urges, however, that, by reason of its ownership of the national forest, the United

[16] Petitioner's amended complaint (R. 12) ambiguously alleges that the fires "occurred on and in the vicinity of" the right-of-way. It will be noted that there is no explicit allegation that any fires originated on the public domain beyond the right-of-way. The Court of Appeals interpreted the amended complaint as alleging that the sparks from the Railroad's locomotive settled within the Railroad's 100-foot right-of-way, and neither petitioner's briefs nor its two petitions for rehearing below contended otherwise. The fourth amended complaint in the companion case, *Arnhold* v. *United States* (No. 47) alleges (R. 6) that the Railroad's locomotive "threw sparks and fire into the dry grass, combustible herbiage and rotten ties both *in and near the tracks*, causing the same to become ignited in at least six places * * *" (emphasis added). Petitioners' brief in the *Arnhold* case likewise treats the fires as originating on the right-of-way.

States was charged with the responsibility of keeping the railroad right-of-way clear of combustible matter. From this premise, petitioner proceeds to the conclusion that, by failing to abate the fire hazard which the Railroad created and continued in violation of both the common law and Washington statutes, the Government itself became answerable under the Tort Claims Act for the consequences of any fire resulting from the Railroad's negligent operations on the right-of-way.

The difficulty with this line of reasoning lies in the invalidity of the premise that the United States owed a duty to this petitioner in respect to the right-of-way. This in turn stems from a misconception of the nature of the Railroad's interest in the right-of-way and the legal duties concomitant with that interest.

1. (*a*) A proper appraisal of the Railroad's interest and duties requires a somewhat detailed history of the right-of-way. The records of the Department of Interior reflect that the Port Angeles Western Railroad was built in 1918 and 1919 by the United States Spruce Corporation, a wholly owned government corporation formed at the direction of the Director of Aircraft Production, pursuant to the authority conferred by Chapter XVI of the Act of July 9, 1918, c. 143, 40 Stat. 845, 888. In large measure the roadbed traversed lands which were then a part of the public domain. Its construction across those lands was accomplished under a special use permit issued by the Secretary of Agriculture.

In the area referred to in petitioner's complaint (R. 11), however, a part of the railroad was built on the property of Clallam Lumber Company. In a warranty deed executed in December 1918, Clallam

granted a railroad right-of-way, 100 feet in width, to the Siems, Carey-H. S. Kerbaugh Corporation; the latter, its successors and assigns were "to have and to hold the same, with the tenements, hereditaments, and appurtenances * * * forever".[2] By a second warranty deed, executed in March 1919, the Kerbaugh Corporation assigned its entire interest in the right-of-way to the United States Spruce Corporation.[3]

In 1922, the Spruce Corporation, in the course of liquidation, contracted for the sale of its railroad properties to a group of private individuals and, in 1925, the vendees under that contract organized the Port Angeles Western Railroad and transferred their interest to it.

On May 3, 1938, the Port Angeles Western Railroad filed a formal application with the Department of Interior for the grant to it of a permanent right-of-way for that portion of the railroad which crossed government-owned land. Submitted with the application were documents required by the Right of Way Act of March 3, 1875, 18 Stat. 482, 43 U. S. C. 934, and the regulations promulgated by the Department of Interior thereunder.[4] On September 18, 1939, Assistant

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[2] This deed is recorded in Volume 102 of the deed records of Clallam County, Washington, at p. 108.

[3] This deed is recorded in Volume 102 of the deed records of Clallam County, Washington, at p. 280.

[4] The Right-of-Way Act, which was designed to aid in the expansion of railroad and telegraph facilities, provides that:

"The right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each

Secretary of Interior Chapman, making specific reference to the Right of Way Act, approved the application.

In 1940, the Clallam Lumber Company transferred to the United States the parcels of its lands through which the right-of-way passed in exchange for certain timber rights. Each of the three deeds which evidenced this transaction in terms excepted the right-of-way from the grant and also, doubtless out of an abundance of caution, provided that the grant to the United States was made subject to any existing railroad rights-of-way.[5]

(*b*) Under Washington law, the Port Angeles Western Railroad enjoyed, at the very least, an easement in that portion of the right-of-way which was granted in the first instance by the Clallam Lumber Company, and which was excepted from the 1940 grant of the underlying fee by the Lumber Company to the United States. See *Pacific Iron Works* v. *Bryant Lumber and Shingle Mill Co.*, 60 Wash. 502, 111 Pac. 578; *Morsbach* v. *Thurston Co.*, 152 Wash. 562, 278 Pac. 686; *Swan* v. *O'Leary*, 37 Wash. 2d 533, 225 P. 2d 199. And the question of the extent of a railroad's

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side of the central line of said road; also the right to take, from the public lands adjacent to the line of said roads, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station-buildings, depots, machine shops, side-tracks, turn-outs, and water-stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road."

[5] These deeds are recorded at the following places in the deed records of Clallam County, Washington: Volume 127, p. 337; Volume 134, p. 261; Volume 135, p. 331.

interest in a right-of-way granted under the 1875 Act has been considered by this Court on several occasions, most recently in *Great Northern Ry. Co.* v. *United States,* 315 U. S. 262. In the *Great Northern* case the Court, after a reference to the legislative history of the Act, its early administrative interpretation and the construction placed upon it by Congress in subsequent enactments, held unequivocally that railroads enjoy an easement in their rights-of-way on public lands. This holding was followed by the Tenth Circuit in *Himonas* v. *Denver & R. G. W. R. Co.,* 179 F. 2d 171.

The present administrative construction of the character of the grant under the Right of Way Act fully accords with the judicial review. The regulations of the Department of Interior pertaining to rights-of-way advise railroads that, while they do not possess a full and complete title to the land over which the right-of-way is located, they do enjoy the right to use the land for the purposes for which the grant was made and may hold possession for as long as that use continues. The regulations give further assurance that, if the Government conveys the fee simple title, the patentee will take subject to the railroad's right of use and possession. And persons settling on a tract of public land also take subject to any existing right-of-way. See 43 C. F. R. (1949 ed.) 243.2.

2. Since the Port Angeles Western Railroad was the possessor of an easement as to the land upon which it maintained its right-of-way—both that granted by the Government and that originally ac-

corded by the Clallam Lumber Company—the United States was under no common law obligation to maintain, repair, or otherwise keep it in good condition. It is settled that, in the absence of a contract specifying the duties and obligations of the dominant and servient owners with respect to the easement, the holder of the servient estate is under no obligation, either to the dominant owner or a third party, to make repairs. Instead, "the duty is upon the one who enjoys the easement to keep it in proper condition, and, if he fails to do so and injury to third persons results, he alone is liable." *Reed* v. *Allegheny County,* 330 Pa. 300, 303, 199 Atl. 187. See also *Herzog* v. *Grosso,* 41 Cal. 2d 219, 259 P. 2d 429; *Strauss* v. *Thompson,* 175 Kan. 98, 259 P. 2d 145; *City of Bellevue* v. *Daly,* 14 Idaho 545, 549, 94 Pac. 1036; *Hastings* v. *Chi, R. I. & P. Ry. Co.,* 148 Iowa 390, 126 N. W. 786; *Herman* v. *Roberts,* 119 N. Y. 37, 23 N. E. 442; *Greenfarb* v. *R. S. K. Realty Corp.,* 256 N. Y. 130, 175 N. E. 649; *Wells* v. *North East Coal Co.,* 274 Ky. 268, 118 S. W. 2d 555; *Reiver* v. *Voshell,* 18 Del. Ch. 260, 158 Atl. 366; *Dodds* v. *St. Louis Union Trust Co.,* 205 N. C. 153, 170 S. E. 652; *Schuricht* v. *Hammen,* 221 Mo. App. 389, 277 S. W. 944; 2 *American Law of Property,* § 8.66; *Jones on Easements* (1898), § 831.

Thus, if there is substance to the allegations in petitioner's complaint regarding the condition of the right-of-way, it was the Railroad alone that breached a common law duty. To maintain a right-of-way in proper condition is, among other things, to keep it free of fire hazards. And where the Railroad fails

to do so, and a fire is started on the right-of-way by sparks from one of its locomotives, Washington law makes it unmistakably clear that it is accountable for any resultant damage to adjoining property. This is true even if, as apparently was not the case here, there is no negligence of the Railroad in equipping and operating the engine. See, *e. g.*, *Abrams* v. *Seattle & M. R. Co.*, 27 Wash. 507, 68 Pac. 78; *Fireman's Fund Ins. Co.* v. *Northern Pacific R. Co.*, 46 Wash. 635, 91 Pac. 13; *Slaton* v. *C., M. & St. P. R. R. Co.*, 97 Wash. 441, 166 Pac. 644. Cf. *Eddy* v. *LaFayette*, 163 U. S. 456.

The Washington rule is of course not unique. In virtually every jurisdiction, the failure to keep its right-of-way clear of combustible matter will render the railroad liable for damage resulting from the ignition of the matter by sparks from a locomotive. See cases cited 18 A. L. R. 2d 1090, *et seq.*, 42 A. L. R. 799, *et seq.* We know of no occasion—and petitioner points to none—where in similar circumstances liability was additionally imposed upon the possessor of the servient estate, *i. e.*, the owner of the ground beneath the right-of-way.

3. The court below correctly held that the fact that the United States may have, in its grant to the Railroad, reserved the right to enter upon the premises, or to require the Railroad to remove combustibles from the right-of-way, does not dilute the applicability of the legal principles discussed above. As petitioner's complaint tacitly concedes, the reservation did not contain an agreement by the Government to assume

the Railroad's responsibility as holder of the easement to abate fire hazards and generally keep the property in good order. And such an agreement is an absolute condition precedent to imposing common law liability upon the servient rather than the dominant owner for injury resulting from faulty maintenance of an easement.

The motivation behind the reservation of a right of entry is not difficult to envisage. The easement having been granted for the limited purpose of use as a railroad right-of-way, the Government should be in a position to insure that no other and unauthorized use is being made of it. Cf. *Great Northern R. Co.* v. *United States, supra.*[6] Additionally, because a failure of the Railroad to take adequate safety precautions in the operation of its trains and the maintenance of the right-of-way might adversely affect the adjoining forest lands owned by the United States, the Government understandably desired, for its own benefit, the opportunity to ascertain the manner in which the Railroad conducted its affairs on the easement.

The short of the matter is that the right of entry, admittedly not coupled with an undertaking to abate fire hazards or even an agreement to assume a duty of inspection of the right-of-way, is simply for the protection of the owner of the servient estate. As such,

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[6] In the *Great Northern* case, the United States sought to enjoin the railroad from drilling or removing oil, gas or minerals underlying its right-of-way. This Court ruled that the Great Northern easement for railroad purposes did not confer rights to materials below the surface of the right-of-way.

petitioner cannot claim the benefit of it; nor does it disturb the force of the normal rule that third persons must look to the owner of the dominant estate if the condition or use of that estate causes harm to them. Cf. *The Dalles City* v. *River Terminals Co.*, 226 F. 2d 100, 103 (C. A. 9); *Burke* v. *Ireland*, 26 App. Div. 487, 50 N. Y. S. 369, 373.[7]

4. Because the Railroad right-of-way crosses the Olympic National Forest, petitioner also urges that the United States was under a special statutory duty to keep the right-of-way clear of inflammable growing grasses and bushes and to abate any hazard thereon. In this connection, it points principally to Sections 5807 and 5818 of the Revised Statutes of the State of Washington (R. C. W. §§ 76.04.370, 76.04.450), *infra*, pp. 80–81.[8] The former (Sec. 5807) provides

[7] The foregoing discussion is equally applicable to the allegations of petitioner's complaint—not stressed in its brief here or in the court below—with respect to the failure of the Railroad to equip its locomotives with adequate spark arresters (R. 11). Neither as the possessor of the servient estate in the right-of-way, nor by reason of any reservation of a right-of-entry, did the Government assume a duty to petitioner to require the Railroad to conduct its operations in any particular fashion. If, in fact, the equipment on the locomotives did not meet the standards imposed by law, and petitioner deemed its property to be endangered thereby, it was petitioner's right as well as obligation, for its own protection, to institute the necessary procedures to compel the Railroad's compliance with all legal requirements. Not having done so, petitioner is hardly in a position to complain that the Forest Service had failed to exercise the similar right that the Government possessed in the interest of protecting the public domain.

[8] Petitioner makes passing references to certain other sections of the Revised Statutes in the body of its brief, and sets forth

that land covered by inflammable debris shall constitute a fire hazard and requires the owner and the person, firm or corporation responsible for the existence of the hazard to abate it. Section 5818 declares it unlawful for any firm, person, company or corporation to do or commit any act which shall expose the forest or timber of the Olympic Peninsula to the hazard of fire. Neither statute is applicable here.

(*a*) Since it is not alleged that the Government committed any act upon the Railroad's right-of-way which exposed the forest to the purported fire hazard thereon, Section 5818 is, by its terms, inapplicable; and the specific wording of the Section certainly does not impose any duty upon the Government of inspecting or maintaining the right-of-way if such a duty were otherwise absent.

Insofar as Section 5807 is concerned, we submit that there is no merit to petitioner's contention that it gives rise to an obligation upon the part of the owner of a servient estate to keep a railroad right-of-way running across his property free of combustible matter. What petitioner's position amounts to is that, without expressly so stating, Section 5807 drastically changes the common law so as to impose upon a servient owner civil liability for the act or omissions of the owner of the dominant estate. Indeed, its theory goes much further than

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a large number of additional sections in the Appendix. With a single exception (see fn. 30, *infra*, p. 48), their lack of materiality to the alleged facts of this case is sufficiently clear, we think, to obviate the need to discuss them.

that. Section 5807 is a criminal statute.* Consequently, under petitioner's construction, a servient owner would be held criminally responsible for statutory violations upon the part of the dominant owner, even though, unlike a landlord-lessor, the former, in the absence of a contractual stipulation to the contrary, has no duties with respect to the easement except the negative one of not interfering with the latter's use. See, *e. g., Bina* v. *Bina,* 213 Iowa 432, 239 N. W. 68; *Herman* v. *Roberts,* 119 N. Y. 37, 23 N. E. 442; *Moffett* v. *Berlin Water Co.,* 81 N. H. 79, 121 Atl. 22; *Jones on Easements* (1898), § 831. This consideration alone, we think, sufficiently explains the inability of petitioner to point to a single judicial decision, either in Washington or elsewhere, which reads the term "owner" in a safety statute of this character as encompassing the holder of the servient estate in a railroad right-of-way.

There are additional compelling reasons why the scope of the term "owner" in Section 5807 is properly limited to persons entitled to present possession—whether or not that possession has been alienated under a lease, license, or similar agreement. If, for example, the United States, by virtue of its two incidents of ownership of the land constituting the right-of-way (*i. e.,* a reversionary interest on cessation of use of the right-of-way for railroad purposes and a right to prevent the railroad from using it for other than such purposes), is to be held accountable as

* The violation of certain sections of Title 36 of the Washington Revised Statutes, including Section 5807, constitutes a misdemeanor. See Section 5821 (R. C. W. § 76.04.480).

"owner" here, it would seem to follow that any holder of (*a*) a right of entry for condition broken, (*b*) a reversionary interest, or (*c*) a contingent or vested remainder in forest land would similarly be an "owner" and liable for violations of the statute by the party in possession. Such a result would not only be absurd but also would plainly conflict with the established principle, followed in Washington, that a criminal statute is to be strictly construed. See, *e. g., State* v. *Furth,* 82 Wash. 665, 678, 144 Pac. 907; *State* v. *Levy,* 8 Wash. 2d 630, 651, 113 P. 2d 306. Moreover, while there may be justification for holding a lessor of timber lands accountable for fire hazards created by his lessee, the same cannot be said with respect to the servient owner of land under a railroad easement. In the first place, it is equitable that the lessor, who directly benefits through rent from the forest operations of the lessee on his land which gave rise to the hazard, share in the responsibility for elimination of the hazard. Secondly, the typical lease or license agreement is one for a defined limited period of time, at the conclusion of which possession of the land reverts to the owner. Consequently, the lessor out of possession will never be confronted with the necessity of assuming *in perpetuity* the burden of policing another's activities.

The situation is entirely different where possession of land is taken under the grant of an easement, especially where the easement is in the nature of a railroad right-of-way. The dominant owner, much like the owner of a determinable fee, takes possession *in perpetuity,* "to have and to hold" so long as the easement is used for the purpose granted. See pp. 19, 21,

supra. This means that the servient owner and his successors in interest, if Section 5807 were applicable to them, would have an uninterrupted responsibility for the condition of the surface of land of which, in all likelihood, they will never regain possession and from which, at the same time, they stand to derive no direct and real benefit. Indeed, it might be that the only action available to a servient holder, who might find the terms of his grant violated by the dominant owner of the easement, is a suit for injunction or termination and ejectment.

We think that it would take much more than Section 5807 as it now stands to attribute any such intent to the legislature. And even if petitioner's construction of the statute were reasonable, in view of the absence of any Washington decisions adopting it—and of the presence on the panel which heard the appeal of an experienced judge from that jurisdiction[10]—petitioner can hardly complain here of the refusal of the court below to subscribe to it. Cf. *MacGregor* v. *State Mutual Co.*, 315 U. S. 280; *Propper* v. *Clark*, 337 U. S. 472, 486–487; *Estate of Spiegel* v. *Commissioner*, 335 U. S. 701, 707–708; *Helvering* v. *Stuart*, 317 U. S. 154, 164.

(*b*) Were Section 5807 to be construed as rendering the holder of the servient estate in a railroad ease-

[10] The Ninth Circuit panel consisted of Judges Bone, Orr and Hastie. Judge Bone was admitted to the Washington bar in 1911. Between that year and his election to the United States Senate in 1932, he practiced law in Tacoma, Washington, held several municipal offices and served in the state legislature. See *The National Cyclopaedia of American Biography*, Volume F (1939–1942), p. 489. He was appointed to the Ninth Circuit in 1944.

ment absolutely liable for the presence of fire hazards on the easement—because of his limited ownership alone and irrespective of whether he or his employees had any part in the creation of those hazards—that statute still could not be invoked by this petitioner. The Tort Claims Act is not an unqualified waiver of immunity in tort. The United States has consented to be sued under the Act only for "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U. S. C. 1346 (b), *infra*, p. 79. This jurisdictional language incorporates into the Act the common law test of *respondeat superior* for the purpose of determining the tort liability of the United States. *Williams* v. *United States*, 350 U. S. 857; *United States* v. *Campbell*, 172 F. 2d 500, 503 (C. A. 5), certiorari denied, 337 U. S. 957; *United States* v. *Eleazer*, 177 F. 2d 914, 918 (C. A. 4), certiorari denied, 339 U. S. 903; *National Manufacturing Co.* v. *United States*, 210 F. 2d 263 (C. A. 8), certiorari denied, 347 U. S. 967. And this, in turn, means, as this Court held in *Dalehite* v. *United States*, 346 U. S. 15, 44–45, that the waiver of immunity does not extend to situations where the claim is grounded upon either a statute or common law doctrine which imposes absolute liability without fault. See, also, *Heale* v. *United States*, 207 F. 2d 414 (C. A. 3); *United States* v. *Inmon*, 205 F. 2d 681, 684 (C. A. 5); *Harris* v. *United States*, 205 F. 2d 765, 767 (C. A. 10). Cf. *United States* v. *Hull*, 195 F. 2d 64, 67 (C. A. 1).[11]

[11] As petitioner notes (Pet. Br. pp. 69–72), absolute liability was imposed under the Act by the Fourth Circuit in *United*

B. THE UNITED STATES WAS UNDER NO DUTY TO PETITIONER TO ANTICIPATE THE MISCONDUCT OF THE RAILROAD IN THE USE OF THE RIGHT-OF-WAY AND TO CLEAR THE ADJOINING GOVERNMENT LANDS

In addition to the allegations concerning the combustible matter on the Railroad right-of-way, petitioner's complaint asserts that there were inflammable materials [12] on forest lands of the public domain adjoining the right-of-way (R. 11–12). While the com-

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States v. *Praylou*, 208 F. 2d 291, certiorari denied, 347 U. S. 934. We submit that *Praylou* (which was based in large measure on the same court's pre-*Dalehite* decision in *D'Anna* v. *United States*, 181 F. 2d 335) is in irreconciliable conflict with *Dalehite* and is wrong. In any event, the decision appears to rest on special characteristics of airplane accidents.

Petitioner's reliance on *State of Washington* v. *Canyon Lumber Corp.*, 46 Wash. 2d 701, 284 P. 2d 316, is entirely misplaced. The Supreme Court of Washington there read Section 5807 as applying only to those who, unlike the Government with respect to the right-of-way here, have possession of the land on which the combustibles were allegedly present. The issue in *Canyon Lumber* was whether the provisions of the Section permitting the state to recover the cost of fighting fires on land containing combustibles were in violation of the due process clauses of the federal and Washington Constitutions. In finding no constitutional objection, the court did not consider, let alone decide, the questions which were before the court below, *viz:* (1) whether Section 5807 confers actionable rights on third parties for fire loss, apart from and beyond their rights under the common law; (2) whether, if so, the Section has the effect of imposing absolute liability in the non-constitutional sense in which that term was employed in *Dalehite;* and (3) whether, in any event, the Section looks to the imposition of the *respondeat superior* type of liability to which the Tort Claims Act is restricted.

[12] "[T]rees of various sizes, both standing and down, accumulations of rotten ties, logging and land clearing debris, inflammable growing grasses and bushes * * *."

plaint does not assert that this alleged fire hazard was created by Government employees, petitioner contends that the mere presence of this material calls for the imposition of liability upon the United States for the damage done to petitioner's property by the fire which the Railroad negligently started on the right-of-way. We submit that, as the court below held, this contention is likewise without merit.

1. It was held at common law that a landowner had an almost unlimited right to use his property as he saw fit. See, *e. g.*, cases cited in 12 L. R. A. (N. S.) 624. This meant that a owner might store inflammable material on his land without incurring liability for the spread of a fire from adjoining land through the material onto other adjoining land. See, *e. g.*, *Bowers* v. *East Tennessee & W. N. C. R. Co.*, 144 N. C. 684, 57 S. E. 453. It similarly meant that a railroad which negligently had set fire to inflammable matter on neighboring property could not plead the presence of the matter as contributory negligence.

This is well illustrated by *Leroy Fibre Co.* v. *Chi., Mil. & St. P. Ry.*, 232 U. S. 340. There, suit was brought against the railroad to recover for the destruction of inflammable flax straw which had been stacked on the plaintiff's property adjacent to the right-of-way and which had become ignited by a spark from a railroad locomotive. One of the questions certified to this Court was whether it was for the jury to decide if the plaintiff was held to the exercise of reasonable care to protect the straw from a fire set by the negligence of the railroad. The Court held that

it was not, observing that the Fibre Company was under no duty to conform its use of its own property to the possibility of wrongful acts by the railroad on the right-of-way.

It is true that in recent years some jurisdictions have modified the common law rule. There is current authority for the view that a landowner is responsible for damage to adjoining land from a fire *originating in combustibles on his property,* even if the fire started as the result of a negligent act of a trespasser on the property. Thus, in *Prince* v. *Chehalis Savings & Loan Association,* 186 Wash. 372, 58 P. 2d 290, affirmed on rehearing, 186 Wash. 377, 61 P. 2d 1374, the defendant was held liable for the spread of a fire starting in his abandoned garage, where the garage was left in a state of disrepair and was used at night by itinerants. And, in *Arneil* v. *Schnitzer,* 173 Ore. 179, 144 P. 2d 707, the same result was obtained where owners of a sawmill allowed inflammable debris to accumulate and an itinerant, entering upon the property, discarded a lighted cigarette in the vicinity of the debris.

There was no suggestion in these cases of a further and drastic modification of the common law to impose liability where the acts of negligence causing ignition of the combustibles take place on adjoining lands (such as the railroad right-of-way here) which are in the possession, and thus are the responsibility, of a third person.[13] And while the Washington courts have not

[13] Nor was there any such suggestion in the cases cited by petitioner on page 56 of its brief, with the possible exception of *Riley*

been confronted squarely with that question, it has been considered recently in California. In that jurisdiction, a landowner remains under no duty, in the use of his property, to guard against the possibility of negligence by a railroad in the operation of its trains on a nearby right-of-way. See *Atlas Assurance Co. Ltd.* v. *State,* 102 Cal. App. 2d 789, 229 P. 2d 13, 17, 19. Cf. *Kleinclaus* v. *Marin Realty Co.,* 94 Cal. App. 2d 733, 211 P. 2d 582, 583–584. We know of no holding in any jurisdiction to the contrary."[14]

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v. *Standard Oil Co. of Indiana*, 214 Wis. 15, 252 N. W. 183, where, as the court below observed (R. 86), "the point in question was assumed by the court without reference to authorities or arguments." In *Keyser Canning Co.* v. *Klots Throwing Co.*, 94 W. Va. 346, 118 S. E. 521, for example, plaintiff and defendant were both lessees of portions of the same building. Because of the negligence of the latter, a fire started in the portion under lease to it and destroyed the entire building. Similarly, in *Collins* v. *George*, 102 Va. 506, 46 S. E. 684, the outbreak of the fire was found to have been attributable to the defendant.

[14] *Stephens* v. *Mutual Lumber Co.*, 103 Wash. 1, 173 Pac. 1031, upon which petitioner places considerable reliance (Pet. Br., p. 77), in no way conflicts with the *Atlas* decision. In *Stephens*, a fire, started by sparks from a donkey engine engaged in logging operations, destroyed certain personal property of the plaintiff employees of the lumber company. The evidence revealed that there was an interval of several hours between the outbreak of the fire and the damage complained of, during which the plaintiffs made no effort at all to remove their property from the area. In holding that recovery was barred by the plaintiffs' contributory negligence, the court did no more than to apply the familiar principle that an individual, once he has become aware of the occurrence of an act of negligence on the part of another, must exercise reasonable care to mitigate loss to himself stemming from that negligence. See *Prosser on Torts* (1941), p.400. There was, of course, no suggestion by the court that the plaintiffs were under a duty to anticipate the commencement of the fire and to remove their property in advance; or that, had the fire spread through

2. Perhaps because of a recognition of these considerations, petitioner again seeks to rely—in connection with the material on the Government land near the right-of-way—upon Section 5807 of the Washington Revised Statutes (as it did with respect to the right-of-way itself, see *supra,* pp. 25–30). In this connection, it makes the broad assumption—necessary to cover this case—that the effect of this Section is to render a landowner liable to third parties for the presence of combustible material on his property even if (1) the fire which caused the damage originated on adjoining land and through the negligence of the adjoining landowner, and (2) the purported fire hazard on the owner's land was not the result of his own acts or those of his employees. The statute, however, does not say so [15] and it has never been judicially construed as repealing the common law rule with respect to third party non-liability in such circumstances. If, however, petitioner were right in its view as to the scope of Section 5807, the statute (as we have pointed out) would impose liability of the absolute—rather than *respondeat superior*—

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their property to that of other employees, the failure to take such advance precautions would have rendered plaintiffs liable to the others.

[15] It is interesting to note that, where the Washington legislature has desired a violation of a particular forest statute to give rise to civil liability to third persons, it has felt constrained to include an express provision to that effect in the statute itself. For example, Section 5647 of the Washington Revised Statutes, R. C. W. § 4.24.040, which requires a person lawfully setting a fire on his own land to exercise care to prevent its spreading and causing damage to adjoining property, stipulates additionally that "if he fails so to do he shall be liable * * *to any person suffering damage thereby to the full amount of such damage."

type and could not be invoked here consistently with the terms of 28 U. S. C. 1346 (b). See pp. 29–30, *supra*.

C. ANY COMBUSTIBLE MATTER WAS NOT THE PROXIMATE CAUSE OF THE DAMAGE COMPLAINED OF

The court below did not restrict itself to determining that the purported presence of combustibles on and about the right-of-way did not constitute a breach of any duty imposed by state law upon the United States and actionable under the Tort Claims Act. As an independent ground, the court held that, reading the complaint in its entirety, the alleged negligence in this respect was not the proximate cause of the damage to petitioner's property. While, in light of the correctness of the court's reading of the Washington law on the responsibility of a landowner, there may be no necessity for this Court to consider the proximate causation holding, we submit that it too represents a proper application of generally accepted principles, fully accepted by the Washington courts.[16]

1. It is basic to the law of torts that an act of abstract negligence cannot support the imposition of liability; facts must further be alleged and proved which demonstrate that damage was proximately caused by the negligence. *Prosser on Torts* (1941), pp. 311, *et seq.*; Green, *Rationale of Proximate Cause*, 1927

[16] It might be observed in passing that petitioner's assertion that the question of proximate causation was neither briefed nor argued below is incorrect. The Government raised this issue in its brief (pp. 21–22); petitioner responded in its reply brief (pp. 12–13); and the Court of Appeals brought up the subject during the course of the oral argument.

(pp. 3, 4). "Legal" or "proximate" cause is therefore an essential element in any cause of action sounding in negligence whether it be based on the asserted violation of a common law duty or a statute. Nor does it matter that the statute imposes absolute liability or even characterizes violations as "negligence per se." In either case, liability in tort is still dependent upon a showing that the harm proximately resulted from the violation. See, *e. g., Schatter* v. *Bergen,* 185 Wash. 375, 55 P. 2d 344.

In Washington, as elsewhere, the proximate cause of a particular loss or injury is that "cause which, in a natural and continuous sequence, unbroken by any new, independent cause, produces [the damage], and without which that [damage] would not have occurred." *Burr* v. *Clark,* 30 Wash. 2d 149, 157, 190 P. 2d 769, 773. See also *Scobba* v. *City of Seattle,* 31 Wash. 2d 685, 198 P. 2d 805; *Viking Automatic Sprinkler Co.* v. *Pacific Indemnity Co.,* 19 Wash. 2d 294, 142 P. 2d 394; *Pierce* v. *Pacific Mutual Life Ins. Co.,* 7 Wash. 2d 151, 109 P. 2d 322; *Eckerson* v. *Ford's Prairie School District No. 11,* 3 Wash. 2d 475, 101 P. 2d 345. Cf. *Prosser on Torts* (1941), pp. 311, *et seq.* And this formula has been applied by the Washington courts with specific reference to fire damage. In holding in *Stephens* v. *Mutual Lumber Co.,* 103 Wash. 1, 173 Pac. 1031, that subsequent events, rather than the negligence which occasioned the outbreak of the fire, was the proximate cause of the loss, the court said (103 Wash. at 6):

> One who loses property by fire is governed by the established rules of law, and recurring

> to first principles, if subsequent to the act of the party charged, whether it be rightful in its inception, or wrongful in the sense that it is negligent, a new cause intervenes which itself is sufficient to stand as the cause of the misfortune, the first act is considered as too remote to sustain a recovery.

2. Assuming the truth of all of the factual allegations of petitioner's complaint, and measuring them against the foregoing test, it cannot be said that the damage to petitioner's property was proximately caused by the assertedly improper manner in which the Railroad maintained its right-of-way and operated its locomotives. According to the complaint, the fire spread, between noon on August 6, 1951 (when it was started by sparks from the locomotive) and August 11, 1951, to the 1,600 acre area in which petitioner had no interest (R. 15). For over a month thereafter (*i. e.*, until September 20 when a wind caused it to spread further on to petitioner's land), the fire allegedly was contained within that area and would have been completely extinguished had the forest ranger properly utilized the men, equipment, and water at his disposal for the purpose (R. 15, 25). Thus, the gravamen of petitioner's action is not the failure of the Forest Service to police the railroad's operations (which, as we have seen and as the court below held, it was under no obligation to do). Rather, it is the supposed failure of the Service to take the appropriate measures to suppress the fire after it had started on the right-of-way and proceeded to the 1600 acre area, but before it went beyond to petitioner's property.

With respect to the purported combustible material on the forest land adjoining the right-of-way—as distinct from the conditions on the right-of-way itself—the lack of requisite causal relationship to the damage complained of is even more apparent. Apart from the considerations referred to in the preceding paragraph, petitioner makes no assertion in its pleadings that this material increased to any degree the rapidity of the spread of the fire, or that the fire would not have spread but for their presence. As a matter of fact, there is not even a clear allegation that the flames ever reached this material. In these circumstances, even if the Government had been under a duty to petitioner to guard against the possibility that acts of negligence by the Railroad on the right-of-way might give rise to a fire and spread to nearby Government lands, petitioner's allegations as to the condition of the forest would still be wholly immaterial.

For these reasons (*supra,* pp. 17–39), liability may not be imposed upon the United States for the consequences of the forest fire because of the alleged presence of combustible matter upon or near the railroad right-of-way, or because of any other misconduct attributable to the Port Angeles Western Railroad.

II

LIABILITY MAY NOT BE IMPOSED UPON THE UNITED STATES UNDER THE TORT CLAIMS ACT FOR THE ASSERTED NEGLIGENCE OF THE FOREST SERVICE IN FIGHTING THE FIRE

The remaining question in the case is whether petitioner may recover damages for the asserted failure

of Forest Service personnel to fight the fire properly, once it had started. We now show that under this Court's decision in *Dalehite* v. *United States*, 346 U. S. 15, the answer to this question is in the negative and that the *Dalehite* holding on this point should not be disturbed because it is in accord with traditional tort law and the purpose of the Tort Claims Act.

A. THE ACTS OF THE FOREST SERVICE PERSONNEL IN FIGHTING THE FOREST FIRE ON PUBLIC AND PRIVATE LAND WERE THOSE OF PUBLIC FIREMEN

The court below determined that in fighting the fire—which, we emphasize again, had been negligently started by the Railroad on its own right-of-way and which then spread to private and public lands alike—the Forest Service personnel were acting in the capacity of public firemen. This ruling has ample support in the historical background of the Service, in the Congressional enactments pertaining specifically to its fire prevention and suppression activities, and in the allegations of petitioner's complaint. As an examination of these sources discloses, in the Service's efforts to prevent and suppress fires on forest land, it performs the same function, and renders the same services to the public at large, as do local fire departments maintained by cities and towns to protect the property of their residents.

1. *The Forest Service.*—Following the recommendations over a period of years of leading conservationists, who believed that such a step was essential to the preservation of the nation's timber supply, Congress in 1891 authorized the President to set apart

and reserve forest lands of the public domain, whether bearing commercial timber or not, in any state or territory where such land is located. Act of March 3, 1891, c. 561, § 24, 26 Stat. 1103, as amended, 16 U. S. C. 471. Almost immediately thereafter, on March 30, 1891, President Harrison exercised this authority by proclaiming the Yellowstone Park Timberland Reserve. During the balance of the Harrison administration, and the subsequent Cleveland administration, several additional reservations were made.[17]

In spite of its clear conservation purpose, the 1891 Act made no provision for the protection and administration of the forest reserves; nor did it provide any regular method whereby the developing principles of forest management could be applied. This deficiency was remedied in the Sundry Civil Appropriations Act of June 4, 1897, 30 Stat. 11, 35, which stipulated that the Secretary of the Interior shall "make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations" and "may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction." The Secretary of the Interior immediately undertook the administration and protection of the reservations, assigning the task to the then General Land Office which appointed a field force of

[17] See Sparhawk, *The History of Forestry in America*, The Yearbook of Agriculture (U. S. Department of Agriculture, 1949) 702, 706.

supervisors and rangers.[18] The managerial responsibility remained in the Department of the Interior until 1905 when Congress transferred it to the Department of Agriculture, where it was placed in the hands of the Bureau of Forestry.[19] This Bureau, which was headed by Gifford Pinchot (the leading conservationist), became the Forest Service later in the same year and, in 1907, the Forest Reserves were renamed National Forests.[20]

When the administration of the national forests was given to the Forest Service, the then Secretary of Agriculture advised the Service in a formal communication to Chief Forester Pinchot that "it must be clearly borne in mind that [these forests] are to be devoted to [their] most productive use for the permanent good of the whole people."[21] For the past fifty years, this principle has been the Service's watchword in carrying out its duties in respect to the forests, which now are more than 150 in number and cover a total area in excess of 180 million acres.[22] We cite here but a few examples. Timber management plans have been placed into effect to guide the growing and harvesting of timber crops in such a manner as will furnish "continuous supplies of timber for the

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[18] *Id.* at p. 709. See also, *Our National Forests* (U. S. Department of Agriculture Information Bulletin No. 49 (1951)), p. 2.

[19] Act of February 1, 1905, ch. 288, 33 Stat. 628. See also *Our National Forests*, *supra*, n. 18, at p. 2.

[20] *Our National Forests*, *supra*, n. 18, at p. 2. See also Act of March 3, 1905, 33 Stat. 861, 872.

[21] *Id.* at p. 4.

[22] *Id.* at p. 3. See also Annual Report of the Secretary of Agriculture (1952), p. 18.

people of the United States." Range resources have been controlled to assure the best possible supply of forage year after year. Forestry and farming practices designed to protect watersheds and help prevent disastrous flood conditions have been adopted. Recreational areas have been established for the use and enjoyment of outdoor enthusiasts. And the search is continuous for methods and means of increasing further the productivity of all national forest land.[23]

2. *Cooperation with State governments.*—At the same time that the interests of conservation were being furthered through the development and expansion of the national forest system, there was an increasing awareness of the great necessity of cooperation between federal and state governments in providing for protection against forest fires, *irrespective of their place of occurrence.* Cooperation came in 1908, with a federal statute directing the Forest Service to aid in the enforcement of the laws of the states and territories with regard to the prevention and extinguishment of forest fires. Act of May 23, 1908, ch. 192, 35 Stat. 259, 16 U. S. C. 553.

Following a series of unprecedented forest fires in 1910, which burned millions of acres in Minnesota, Idaho, Washington, and Oregon,[24] Congress decided to broaden the participation of the Forest Service in fire fighting activities. By Section 2 of the Act of March

[23] These and other functions of the Forest Service are described in some detail in *The Work of the U. S. Forest Service* (U. S. Department of Agriculture Information Bulletin No. 91 (1952)), pp. 5–20.

[24] See Guthrie, *Great Forest Fires of America* (U. S. Department of Agriculture (1936)), p. 6; *Highlights in Forest*

1, 1911, ch. 186, 36 Stat. 961, 16 U. S. C. 563, the Secretary of Agriculture was authorized to enter into cooperative agreements with states for the organization and maintenance of a system of fire protection on any private or state forest lands situated upon the watershed of a navigable river. And, in 1924, the Secretary's authority was further extended to include cooperative fire protection activities in all "the timbered and forest-producing lands" in "each forest region of the United States." Act of June 7, 1924, ch. 348, 43 Stat. 653, 16 U. S. C. 564, 565.

As a result of these statutory provisions, the Forest Service now cooperates with 43 states in providing fire protection on state and private forest lands.[25] This cooperation takes several forms.[26] The Service has underwritten a substantial portion of the cost of needed equipment and training activities. It helps state foresters in the latters' direction of organized fire prevention and control. It conducts nation-wide fire prevention campaigns. It does extensive research into techniques and devices that will assist states and private landowners in fire prevention and suppression.

Further, the Service has entered into several agreements whereby it has assumed the function of under-

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Conservation (U. S. Department of Agriculture Information Bulletin No. 83 (1952)), p. 9.

[25] Annual Report of the Secretary of Agriculture (1951), p. 18.

[26] See *The Work of the U. S. Forest Service*, n. 23, *supra*, at pp. 12, 18; *The Budget of the United States for the fiscal year ending June 30, 1955*, p. 343.

taking the suppression of fires on *all* lands within a particular area, whether federally-owned or not. As stated in petitioner's complaint (R. 6–7, 9–10), such an agreement was outstanding in the area here involved and by its terms the personnel of the Forest Service were clothed with the duties and privileges of state forest wardens, including the right to conscript and impress men and equipment for fire suppression. And it should be noted that in Washington, as in some other jurisdictions, these wardens have among their duties the control and suppression of forest fires throughout the forest area of the state. See Rev. Code Wash. §§ 76.04.060, 76.04.070. In this capacity, the wardens clearly perform the same functions in relation to the forest area as a municipal fire department performs in relation to the community it serves.[27]

While a summary of Forest Service fire prevention and suppression activities cannot tell the whole story, it does reflect the present magnitude of those activities.

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[27] It may well be, as petitioner suggests (Pet. Br. 65), that a private person could, under a similar agreement with the State of Washington, assume the functions of state forest wardens. If so, that consideration hardly detracts from the force of the conclusion that action taken pursuant to such an agreement is in the capacity of a public fireman. As this Court noted in *Labor Board* v. *Jones & Laughlin Co.*, 331 U. S. 416, 429, when a private individual is performing a public function under authority from the state he acts as a public officer and assumes all of the powers and liabilities attaching thereto. See also *Thornton* v. *Missouri Pacific R. Co.*, 42 Mo. App. 58; *Dempsey* v. *New York Central & Hudson River R. Co.*, 146 N. Y. 290, 40 N. E. 867; *New York C. & St. N. R. Co.* v. *Fieback*, 87 Ohio St. 254, 100 N. E. 889; *Neallus* v. *Hutchinson Amusement Co.*, 126 Me. 469, 139 Atl. 671. And compare the discussion pp. 57–61, *infra*.

During the fiscal year 1953, for example, the Service controlled 11,063 forest fires at a cost of more than 5 million dollars and spent approximately 9.5 million dollars in the execution of its cooperative fire protection agreements with state governments.[28] The figures for the preceding year are no less impressive.[29]

3. *Fire-fighting by the Forest Service.*—Nor is there merit in petitioner's contention that Forest Service employees are not public firemen because they are primarily caretakers of timberlands owned by the Government in a proprietary capacity, and fire fighting is only one of their duties and that service is for the special benefit of the Government (Pet. Br. 16, 17). Although the Government does have a direct concern in the preservation and protection of its vast tracts of national forest in order to preserve this invaluable national resource for the benefit of the people of the United States, petitioner's notion

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[28] The *1955 Budget*, n. 26, *supra*, pp. 338, 339, 343.

[29] *Budget for the fiscal year ending June 30, 1954*, pp. 402, 403, 406.

Despite these considerations, petitioner suggests (Pet. Br. pp. 38–39) that the relevant statutes confer authority upon the Forest Service to engage in fire prevention and suppression activities only in circumstances where the necessities of protecting Government-owned land require to do so. Leaving aside the fact that they are not interpreted in that fashion by the Service, if petitioner is right we fail to see the occasion for the enactment of the 1908, 1911 and 1924 Acts. For, as petitioner itself points out (Br. p. 38), Section 1 of the Act of June 4, 1897, 30 Stat. 35, as amended, 16 U. S. C. 551, gives broad authority to the Secretary of Agriculture to provide for protection against the destruction by fire of public and national forests.

that the Government's real interest is in the commercial exploitation of this timber is without validity. As we have shown, the Forest Service is concerned with the preservation of the forests from fire, whether publicly or privately owned. Pursuant to Congressional authorization, it aids almost every state in providing fire protection to all forest lands within the state. It underwrites a substantial portion of the cost of equipment and training, assists in the direction of organized fire prevention and control, does extensive research into fire prevention and suppression techniques and assumes, through the vehicle of cooperative agreements, the function of fire suppression on all lands within particular areas. It is difficult to conceive of any firefighters more peculiarly in the position of public firemen than the employees of the Forest Service. As in the case of a municipal fire department, the Forest Service makes no real distinction between fires on publicly or privately owned property.

In *Dalehite* v. *United States,* 346 U. S. 15, this Court held that the Coast Guard was acting as a public fireman in fighting the Texas City Disaster fires, even though firefighting is, of course, not the principal function of the Coast Guard, its primary concern being with numerous other types of activities. See *infra,* pp. 50–53. So, petitioner's attempt to define public firemen in terms of the comparative *quantum* of effort directed to this purpose is too artificial to be adaptable to the conditions involved.

4. It seems clear that the fire-fighting endeavors of the Forest Service in this case were undertaken pursuant

to this public policy of assisting in the prevention and suppression of forest fires—and not, as petitioner suggests, by reason of a special duty imposed upon landowners by Washington law. Apart from all other considerations, the Supreme Court of that state, in delineating the landowner's statutory and common law duty respecting the fighting of fires *not set by him,* has emphasized continually that it arises *only* in situations where the fire *originates* or *starts on* his own property. See the quotations at Pet. Br. pp. 59–61; *e. g., Sandburg* v. *Cavanaugh Timber Co.,* 95 Wash. 556, 164 Pac. 200; *Jordan* v. *Spokane P. & S. Ry. Co.,* 109 Wash. 476, 186 Pac. 875; *Walters* v. *Mason County Logging Co.,* 139 Wash. 265, 246 Pac. 749. And other jurisdictions in which a landowner has any duty at all where the fire was not started *by* him impose the same limitation. See, *e. g.,* cases cited 42 A. L. R. 783, 821 *et seq.*; 18 A. L. R. 2d 1081, 1097.[30]

As we have shown above, there is no basis for petitioner's apparent belief that a right-of-way granted to a railroad is, for the purposes of the statutory and common law obligations resting upon the owner of land, the property of the holder of the servient estate. See pp. 17–30, *supra.* While we do not discuss anew at this point the reasons why the right-of-way is (for

[30] To the extent, if any, that petitioner asserts that Section 5806 of the Washington Revised Statutes (R. C. W. § 76.04.380) changes the normal rule (see Pet. Br. p. 78), one complete answer is that the Section imposes no special duty upon the landowner to whose property a fire has spread prior to his receipt of a written notice from a state official.

such purposes) the property of the railroad alone, it is important to note that the freedom from responsibility of the owner of land upon which a railroad right-of-way is maintained is not restricted to instances where the claim is rooted in the alleged presence of inflammable materials on the right-of-way. Cf. p. 23, *supra*. To the contrary, that freedom extends to claims grounded upon the failure to prevent the spread of a fire. While there are many cases holding a railroad accountable for its failure to prevent the spread of a fire *developing on its right-of-way*—following the principle that petitioner seeks to apply against the United States[31]—there has not been, to our knowledge, a single occasion upon which the possessor of a reversionary interest in the surface of the land (*e. g.*, the holder of the servient estate in a railroad easement) has been held similarly accountable.

B. THE UNITED STATES IS NOT LIABLE FOR CLAIMS BASED UPON THE ALLEGED FAILURE OF ITS PUBLIC FIREMEN TO SUPPRESS A FIRE

Thus, the ultimate question is whether recovery may be had under the Tort Claims Act for the assertedly negligent failure of the Forest Service to conduct properly its public function of extinguishing forest fires. This is, of course, the precise question

[31] See *e. g.*, *Jordan* v. *Spokane P. & S. Ry. Co.*, 109 Wash. 476, 186 Pac. 875, and cases cited 42 A. L. R. 783, 795, 812, *et seq.*, 18 A. L. R. 2d 1081, 1089, 1091. These cases show that, if the fire did not originate through the negligence of the railroad, it is liable only for the failure to exercise due care to prevent its spread. Absolute liability is generally imposed where the fire was due to improper operation of the locomotive.

that was before this Court in *Dalehite* v. *United States,* 346 U. S. 15, on which both courts below relied in ruling that petitioner's claim does not come within the ambit of the Act. We submit that, contrary to petitioner's assertions, the *Dalehite* holding conforms in full measure to the terms of the statute and to the traditional law of torts, and should be followed here.

1. 28 U. S. C. 1346 (b) (*infra,* p. 79) confers jurisdiction upon district courts over claims based on the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his employment, under circumstances where the United States, *if a private person,* would be liable to the claimant in accordance with the law of the place where the act or omission occurred. 28 U. S. C. 2674 provides that the assumed liability is only "in the same manner *and to the same extent* as a private individual under like circumstances."

In *Feres* v. *United States,* 340 U. S. 135, the Court construed these provisions as meaning that the Tort Claims Act waives the prior immunity from suit only as to "recognized causes of action" and does "not visit the Government with novel and unprecedented liabilities" (340 U. S. 142) and, as a consequence, recovery will be denied in cases in which "plaintiffs can point to no liability of a 'private individual' even remotely analogous to that which they are asserting against the United States" (340 U. S. at 141). And, in *Dalehite* v. *United States, supra,* this construction was expressly reaffirmed with specific reference to

public firefighting activities on the part of the Coast Guard akin to those of the Forest Service in this case.

In *Dalehite,* the claim was made that the Coast Guard had negligently performed its general public function to fight the fire resulting from the explosion of fertilizer grade ammonium nitrate at Texas City and the District Court, rendering judgment against the United States, specifically found in this regard that the Coast Guard had been negligent "in failing * * * promptly and quickly" to "discover the fire on the *Grandcamp* * * * to use proper and efficient efforts to extinguish such fire on the *Grandcamp,*" in "failing to remove the *Grandcamp* * * * [and the *Highflyer*] from the Texas City Harbor after fire was discovered thereon and before such explosion thereon," and in failing "to extinguish and prevent the spread of the fires in Texas City." The Court of Appeals reversed but, in doing so, did not discuss the merits of these findings. *In re Texas City Disaster Litigation,* 197 F. 2d 771 (C. A. 5). In its view, the requirement of analogous private liability had not been met.

This Court, affirming the determination that the circumstances of the Texas City explosion did not impose liability upon the United States, took a similar position in regard to the negligence charged to the Coast Guard (346 U. S. at 43–44):

> *As to the alleged failure in fighting the fire, we think this too without the Act. The Act did not create new causes of action where none existed before.*

"* * * the liability assumed by the Government here is that created by 'all the circumstances', not that which a few of the circumstances might create. We find no parallel liability before, and we think no new one has been created by, this Act. Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities." *Feres* v. *United States,* 340 U. S. 135, 142.

It did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights. Our analysis of the question is determined by what was said in the *Feres* case. See 28 U. S. C. §§ 1346 and 2674. The Act, as was there stated, limited United States liability to "the same manner and to the same extent as a private individual under like circumstances." 28 U. S. C. § 2674. Here, as there, there is no analogous liability; in fact, *if anything is doctrinally sanctified in the law of torts it is the immunity of communities and other public bodies for injuries due to fighting fire.* This case, then, is much stronger than *Feres.* We pointed out only one state decision which denied government liability for injuries incident to service to one in the state militia. That cities, by maintaining fire-fighting organizations, assume no liability for personal injuries resulting from their lapses is much more securely entrenched. The Act, since it relates to claims to which there is no analogy in general tort law, did not adopt a different rule. See *Steitz* v. *City of Beacon,* 295 N. Y. 51 * * *. To impose liability for the alleged nonfeasance of

> the Coast Guard would be like holding the United States liable in tort for failure to impose a quarantine for, let us say, an outbreak of foot-and-mouth disease.[32] [Emphasis added.]

2. It is difficult to see how petitioner can seriously challenge the correctness of this Court's observation in *Dalehite* that to hold actionable under the Tort Claims Act the alleged failure of federal public firemen to extinguish a fire which was not started by Government employees—and which did not originate on Government property—would be to visit the United States with a novel and unprecedented liability. To our knowledge, there has never been an instance in American jurisprudence in which liability has been imposed for such a failure—and petitioner has referred to none.[33] To the contrary, it has uni-

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[32] While the dissenting justices were of the view that plaintiffs were entitled to recovery, they did not take issue with the majority of the Court as to the fire-fighting immunity aspect of the case. Instead, the dissenting justices found the circumstances surrounding the manufacture and shipping of the FGAN to afford a basis for imposing liability.

As will be seen below (*infra*, pp. 62–73), the reference in the *Dalehite* opinion to *Steitz* v. *City of Beacon* is especially meaningful because that case arose under Section 8 of the New York Court of Claims Act which subjects the state and its subdivisions to the same liability as individuals or corporations for the same acts.

[33] *City of Denver* v. *Porter*, 126 Fed. 288 (C. A. 8), and the other cases cited by petitioner on pages 30–31 of its brief, all involved situations where—unlike this case—the fire originated on the defendant's property. Further, in all but *State* v. *City of Marshfield*, 122 Ore. 323, 259 Pac. 201, the fire was deliberately set by municipal employees, most frequently to consume garbage in a refuse dump. Thus, these cases stand simply for

formly been held that claims of that character are not cognizable in tort. See *e. g., Edmondson* v. *Town of Morven,* 41 Ga. App. 209; *Wright* v. *City Council of Augusta,* 78 Ga. 241; *Brinkmeyer* v. *City of Evansville,* 29 Ind. 187; *Robinson* v. *The City of Evansville,* 87 Ind. 334; *Rhodes* v. *Kansas City,* 167 Kan. 719, 208 P. 2d 275; *Patch* v. *Covington,* 56 Ky 722; *Davis* v. *City of Lebanon,* 108 Ky. 688, 57 S. W. 471; *Small* v. *Board of Council of The City of Frankfort,* 203 Ky. 188, 261 S. W. 1111; *Yule* v. *City of New Orleans,* 25 La. Ann. 394; *Heller* v. *Mayor, Alderman, and Citizens of Sedalia,* 53 Mo. 159; *Wheeler* v. *City of Cincinnati,* 19 Ohio St. 19; *Irvine* v. *Chattanooga,* 101 Tenn. 291, 47 S. W. 419; *Tumlinson* v. *City of Brownsville,* 178 S. W. 2d 546 (Tex.); *Hughes* v. *State of New York,* 252 App. Div. 263, 299 N. Y. S. 387 (discussed pp. 66–68, *infra*).

Closely related to the cases in which the claim is founded upon the failure of a public fireman to extinguish a fire are those in which the claim results from the assertedly negligent failure of a city properly to perform its assumed duty of providing sufficient

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the proposition that "one who negligently sets a fire on his land and keeps it negligently is liable to an action for any damage done by its spreading to the land of another." *Herrick* v. *City of Springfield,* 288 Mass. 212, 215, 192 N. E. 626. We do not take issue with this principle, which has been codified in Washington. Section 5647 of the Washington Revised Statutes, R. C. W. § 4.24.040. But it has no bearing whatsoever on this case since the fire was started by the Railroad on its own right-of-way.

water for fire protection. These cases also reject, without exception, the imposition of liability. See *e. g., Miralago Corp.* v. *Village of Kenilworth,* 290 Ill. App. 230, 7 N. E. 2d 602; *Van Horn* v. *The City of Des Moines,* 63 Iowa 447, 19 N. W. 293; *Phillips* v. *City of Elizabethtown,* 218 Ky. 428, 291 S. W. 358; *Tainter* v. *City of Worcester,* 123 Mass. 311; *Howland* v. *The City of Asheville,* 174 N. C. 749, 94 S. E. 524; *Stevens* v. *Manchester,* 81 N. H. 369, 127 Atl. 873; *Gilbert* v. *New Mexico Construction Co.,* 39 N. M. 216, 44 P. 2d 489; *Grant* v. *City of Erie,* 69 Pa. 420; *Black* v. *The City of Columbia,* 19 S. C. 412; *Butterworth* v. *City of Henrietta,* 25 Tex. Civ. App. 467, 61 S. W. 975; *Foster* v. *Water Company,* 71 Tenn. 42; *Mendel* v. *City of Wheeling,* 28 W. Va. 233; *Steitz* v. *The City of Beacon,* 295 N. Y. 51, 64 N. E. 2d 704 (discussed pp. 68–72, *infra.*)

While it is true that this common result is not accomplished by a similar uniformity in rationale, the principal consideration underlying the vast majority of these decisions is the inability of the plaintiff to point to the breach of any duty which is owed by the municipality to him as an individual. It is generally recognized that fire protection, in common with police protection, is provided as an incident of government for the benefit of the public as a whole. As such, it is neither intended to, nor does, give rise to actionable rights in individual members of the public who may deem themselves to have been aggrieved by the failure of the undertaking to accomplish in full measure its

intended public objective.[34] Many of these holdings are also bottomed upon other considerations of public policy. The judicial fear has been expressed that a contrary result would eventuate in the bankruptcy of the municipality; that, as a practical matter, the municipality, by establishing a fire protection and suppression service, would become an insurer against fire loss; that it was most inadvisable to have courts and juries oversee, after the event, the work of firefighters. See *e. g., Wilcox* v. *City of Chicago,* 107 Ill. 334; *Wright* v. *City Council of Augusta, supra; Brinkmeyer* v. *City of Evansville, supra; Van Horn* v. *City of Des Moines, supra.*[35] At least one court has suggested that

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[34] In *Miralago Corp* v. *Village of Kenilworth*, *supra*, for example, the defendant village, after having first undertaken to supply water needed to extinguish a fire in an adjoining township, withdrew its assistance before this end was accomplished. The court found that the village, by voluntarily assuming the function of furnishing water, had obligated itself to continue to do so until the fire was extinguished. But, in the court's view, the obligation was one to the public generally and thus neglect in its performance was not actionable. Cf. *Vanhorn* v. *City of Des Moines, supra; Stevens* v. *Manchester, supra.*

[35] In the *Vanhorn* case, the court noted that, in the emergency situations which necessitate the intervention of fire fighting services, it is virtually impossible to ascertain what provisions and actions will prove sufficient for the occasion. Cf. *P. Dougherty Co.* v. *United States*, 207 F. 2d 626, 634 (C. A. 3), certiorari denied, 347 U. S. 912.

In the *Wilcox* case (107 Ill. at 339–340), the court stated the basic reason for the rule to be that otherwise it "would subject the city to the opinions of witnesses and jurors whether sufficient dispatch was used in reaching the fire after the alarm was given; whether the employees had used the requisite skill for its extinguishment; whether a sufficient force had been provided to secure safety; whether the city had provided

these potential consequences "might well frighten our municipal corporations from assuming the startling risk." *Foster* v. *Water Co.,* 71 Tenn. at 49.

3. Petitioner to the contrary notwithstanding, the firefighting holding in *Dalehite* did not incorporate into the Tort Claims Act the governmental-proprietary dichotomy of municipal corporation law—criticized in *Indian Towing Co.* v. *United States,* 350 U. S. 61, 65. This is shown by the cases dealing with the liability of private water companies for negligence leading to fire loss. These companies, of course, do not now and have never enjoyed sovereign immunity. Yet, in all but three jurisdictions, where liability is imposed on a contractual basis (see fn. 37, *infra,* p. 61), they are held not accountable for such loss. And, as is seen from *German Alliance Insurance Co.* v. *Home Water Supply Co.,* 226 U. S. 220, and *Moch* v. *Rensselaer Water Co.,* 247 N. Y. 160, 159 N. E. 896, the reason is little different from that at the foundation of the cases involving suits against municipalities. In addition, these cases provide the total answer to the argument made by petitioner (Br. pp. 64–67) that the contract between the Forest Service and the State of Washington affords a basis for imposing tort liability upon the United States.

In *German Alliance,* the water company had entered into a contract with the City of Spartanburg to sup-

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proper engines and other appliances to answer the demand of the hazards of fire in the city * * *. To permit recoveries to be had for all such and other acts would virtually render the city an insurer of every person's property within the limits of its jurisdiction * * *. Sound public policy would forbid it, if it was not prohibited by authority."

ply water for, among other purposes, fire protection. Pursuant to the contract, the city directed the water company to install certain fire hydrants and connecting pipes in the neighborhood of a building which was insured by German Alliance. The company failed to do so. As a consequence, there was no water available to extinguish a fire which developed in the building. German Alliance, subrogated to the rights of the owner of the building, brought suit against the water company on the theory that the resulting loss was attributable to the latter's negligent violation of "its duty and obligations to adequately protect the property from fire."

Both of the lower courts held that the complaint failed to state a cause of action either in contract or tort, and this Court agreed. At the outset, it noted that the city was under no legal obligation to furnish water for fire protection and that, if it did so voluntarily, "it did not thereby subject itself to a new or greater liability." 226 U. S. at 227. Rather, "[i]t acted in a governmental capacity, and was no more responsible for failure in that respect than it would have been for failure to furnish adequate police protection." *Ibid.*

The Court then went on to hold that, since the common law did not impose a duty upon a public corporation to furnish fire protection, neither did it require private companies to do so. And, in response to the insurer's argument that such a duty was assumed by contract, the Court observed that, by its very nature, the contract was for the benefit of the

citizenry as a whole and that the "indirect" interest of individual citizens in its performance gave rise to no private right of action for an alleged breach. According to the Court, the private citizen (226 U. S. at 231):

> * * * is interested in the faithful performance of contracts of service by policemen, firemen, and mail-contractors, as well as in holding to their warranties the vendors of fire engines. All of these employes, contractors, or vendors are paid out of taxes. But for the breaches of their contracts the citizen cannot sue—though he suffer loss because the carrier delayed in hauling the mail, or the policeman failed to walk his beat, *or the fireman delayed in responding to an alarm, or the engine proved defective, resulting in his building being destroyed by fire.*[34] [Emphasis added.]

The situation in *Moch* v. *Rensselaer Water Co., supra,* was closely parallel to that in *German Alliance.* The defendant water company had entered into a contract with the city of Rensselaer to supply water to private homes and the city's fire hydrants. While the contract was in force, a warehouse close to Moch's

[34] Cf. *Turner* v. *United States,* 248 U. S. 354. There, this Court, per Mr. Justice Brandeis, upheld the dismissal of a claim which had been grounded upon the failure of an Indian Nation to prevent certain mob violence which resulted in damage to plaintiff's property. Sovereign immunity had been waived by Congress. The Court observed that (248 U. S. at 358) "[t]he fundamental obstacle to recovery is not the immunity of a sovereign to suit, but the lack of a substantive right to recover the damages resulting from failure of a government or its officers to keep the peace."

property caught fire. The water company was notified of the fire but allegedly failed "to supply or furnish sufficient or adequate quantity of water, with adequate pressure to stay, suppress or extinguish the fire before it reached [Moch's warehouse]." Moch then brought suit against the water company both in contract and in tort, relying on the provisions of the contract between the water company and the city. Judge Cardozo, speaking for a unanimous court, observed that no actionable duty rests upon a city to supply its inhabitants with protection against fire. As a consequence, a member of the public could not maintain an action by reason of the water company's contract to supply water for fire hydrants, unless the contract showed that the water company had expressly agreed to be answerable to individual members of the public in spite of the fact the city itself would not have been so answerable (159 N. E. at 897). Judge Cardozo went on to point out, in respect to the action in tort, that the so-called "good Samaritan" rule, previously laid down in his opinion for the court in *Glanzer* v. *Shepard,* 233 N. Y. 236, 135 N. E. 275, 276, was not applicable, adding (159 N. E. at 898, 899):

> The plaintiff would have us hold that the defendant, when once it entered upon the performance of its contract with the city, was brought into such a relation with every one who might potentially be benefited through the supply of water at the hydrants as to give to negligent performance, without reasonable notice of a refusal to continue, the quality of a tort.

There is a suggestion of this thought in *Guardian Trust & Deposit Co.* v. *Fisher,* 200 U. S. 57 * * * but the dictum was rejected in a later case decided by the same court *German Alliance Ins. Co.* v. *Homewater Supply Co.,* 226 U. S. 220 * * * when an opportunity was at hand to turn it into law. We are satisfied that liability would be unduly and indeed indefinitely extended by this enlargement of the zone of duty.[37]

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[37] See also, to the same effect, *Consolidated Biscuit Co.* v. *Illinois I. P. Co.*, 303 Ill. App. 80, 24 N. E. 2d 582; *Trustees* v. *New Albany Waterworks*, 193 Ind. 368, 140 N. E. 540; *Hone* v. *Presque Isle Water Co.*, 104 Me. 217, 71 Atl. 769; *House* v. *Houston Waterworks Co.*, 88 Tex. 233, 241, 31 S. W. 179; *Foster* v. *Water Co.*, 71 Tenn. 42; *Concordia Fire Ins. Co.* v. *Simmons Co.*, 167 Wis. 541, 168 N. W. 199; and cases cited 62 A. L. R. 1205. In the *House* case, the governing principle was put in these terms:

"It is not true, that for every failure to perform a public duty an action will lie in favor of any person who may suffer injury by reason of such failure. If the duty is purely a public duty, then the individual will have no right of action; but it must appear that the object and purpose of imposing the duty was to confer a benefit upon the individuals composing the public."

As this Court noted in the *German Alliance* case, *supra*, 226 U. S. at 229, and as is indicated in the exhaustive A. L. R. annotation just referred to, only three jurisdictions deviate from the majority rule. See *Mugge* v. *Tampa Water Works*, 52 Fla. 371, 42 So. 81; *Fisher* v. *Greensboro Water Supply Co.*, 128 N. C. 375, 38 S. E. 912; *Tobin* v. *Frankfort Water Co.*, 158 Ky. 348, 164 S. W. 956, holding that, by reason of its contract with the city and the franchise and other special privileges obtained thereby, a private water company assumes an actionable *contractual* obligation to individual members of the public to provide sufficient water for fire protection. It might be noted in this connection that the Supreme Court of Kentucky has expressly recognized that the maintenance of a fire department does not impose a correlative actionable duty on a municipality. See *Terrell* v. *Louisville Water Co.*, 127 Ky. 77, 105 S. W. 100.

4. Additional indication that the long-standing rule as to firefighting, invoked by this Court in *Dalehite* and illustrated by the above-discussed cases, is grounded upon considerations removed from sovereign immunity is to be found in the decisions of the New York courts in this area over the past quarter century. In 1929, New York waived its immunity from tort liability, as well as that of its political subdivisions, in the same fashion (though with broader scope) as did the Federal Government subsequently through the Tort Claims Act. It was this development which occasioned this Court's comment in *Indian Towing* v. *United States, supra,* 350 U. S. at 65, that "one State at least has sought to emerge" from the " 'nongovernmental'—'governmental' quagmire that has long plagued the law of municipal corporations." But now, as before 1929, it is settled law in New York that the alleged failure of a public fireman to extinguish a fire, not originated by a public body, does not give rise to private actionable rights.

(*a*) Effective September 1, 1929, New York added to its Court of Claims Act, as Section 12a, the following:

> The state hereby waives its immunity from liability for the torts of its officers and employees and *consents to have its liability for such torts determined in accordance with the same rules of law as apply to an action in the supreme Court against an individual or a corporation,* and the state hereby assumed liability for such acts, and jurisdiction is hereby conferred upon the court of claims to hear and determine all claims against the state to

> recover damages for injuries to property or for personal injury caused by the misfeasance or negligence of the officers or employees of the state while acting as such officer or employee * * *.[38] [Emphasis added.]

In 1939, Section 12–a was replaced by Section 8 (L. 1939, c. 860), which provides that:

> The state hereby waives its immunity from liability and action and hereby assumes liability and *consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations,* provided the claimant complies with the limitations of this article. * * * [Emphasis added.]

In terms, therefore, these two Sections equate the liability of the state to that of a similarly-situated private individual or corporation, as does 28 U. S. C. 1346 (b) with respect to the tort liability of the Federal Government. And such has been its consistent construction by the New York Court of Appeals. As stated in *Jackson* v. *State of New York,* 261 N. Y. 134, 138, 184 N. E. 735, 736:

> By section 12–a liability when proved by the rules of law applicable to individuals, has been affirmatively assumed * * * [the Section] declares that no longer will the State use the mantle of sovereignty to protect itself from such consequences as follow negligent acts of individuals * * * [i]t admits that in such negli-

[38] L. 1929, chapter 467, quoted in *Jackson* v. *State of New York,* 261 N. Y. 134, 137, 184 N. E. 735, 736.

> gence cases the sovereign ought to and promises that in future it will voluntarily discharge its moral obligations in the same manner as the citizen is forced to perform a duty which courts and legislatures have so long held, as to him, to be a legal liability. It transforms an unenforceable moral obligation into an actionable legal right and applies to the state the rule *respondeat superior*.[39]

Moreover, while neither Section 12–a nor Section 8 makes specific reference to counties, municipalities, nor other political subdivisions, the Court of Appeals has held that their waiver of immunity is co-extensive with that of the state. See *e. g., Bernardine* v. *City of New York,* 294 N. Y. 361, 365, 62 N. E. 2d 604; *McCrink* v. *City of New York,* 296 N. Y. 99, 106, 71 N. E. 419; *Holmes* v. *County of Erie,* 291 N. Y. 798, 53 N. E. 2d 369.

(*b*) By virtue of the broad and unlimited waiver of sovereign immunity in Section 8 of the New York Court of Claims Act, and its predecessor, the conventional governmental-proprietary dichotomy no longer is recognized in New York. As this Court itself pointed out in *Indian Towing* v. *United States,* 350

[39] Indeed, the waiver of immunity contained in the New York statute is broader than that reflected by the Federal Tort Claims Act. For example, the former encompasses claims grounded upon false arrest and imprisonment (*Dailey* v. *State of New York*, 75 N. Y. S. 2d 40) and assault (*Nephew* v. *State of New York*, 36 N. Y. S. 2d 541). The Tort Claims Act, however, expressly excepts from its coverage "[a]ny claim arising out of assault, battery, false imprisonment, false arrest * * *." 28 U. S. C. 2680 (h). Similarly, the New York statute does not have an equivalent to 28 U. S. C. 2680 (a), which bars claims based upon negligence in the performance of discretionary functions.

U. S. at 65, n. 1, liability in *Bernardine* v. *City of New York*, 294 N. Y. 361, 62 N. E. 2d 604, was imposed upon a municipality for injuries occasioned by a runaway police horse and in *Foley* v. *State of New York*, 294 N. Y. 275, 62 N. E. 2d 69, the same result was reached with respect to a claim grounded upon the negligent failure of a traffic light to function properly.

In both of these cases, the basis of the ruling was, as it had to be, that the conduct complained of violated either a common law or statutory duty, the nature of which duty was such as to confer actionable rights upon individual members of the public. In *Foley*, the court found that duty in the provisions of the New York Vehicle and Traffic Law relating to the maintenance of traffic signals. And *Bernardine* is merely an application of the principle that an equestrian's obligation to keep his mount under control is no different from the obligation of a motorist to operate his vehicle properly; a failure to meet the requisite standard of care gives rise to liability to persons injured thereby.[40]

[40] For other instances of the imposition of liability on the state for negligence which can be said to be "in the conduct of governmental activities in circumstances like unto those in which a private person would be liable" (cf. *Indian Towing Co.* v. *United States*, 350 U. S. at 68), see *Brittan* v. *State of New York*, 103 N. Y. S. 2d 485 (improper supervision of physical fitness test required for admission to state education institution); *Williams* v. *City of New York*, 57 N. Y. S. 2d 39 (pedestrian injured by reason of negligent maintenance of firehouse); *Snyder* v. *Binghamton*, 245 N. Y. S. 497, affirmed, 233 App. Div. 782, 250 N. Y. S. 917 (negligent operation of fire truck).

(*c*) Since the enactment of Section 12–a, the New York courts on at least two occasions have been called upon to decide whether the elimination of sovereign immunity in tort, and the subjection of the governmental units of the state to the same liability that is imposed upon private individuals, rendered actionable the alleged negligent failure of a municipality to prevent loss of private property flowing from a fire which did not originate on public property, nor through the carelessness of public employees. The answer on both occasions was unequivocally in the negative.

In *Hughes* v. *State*, 252 App. Div. 263, 299 N. Y. S. 2d 387, a fire of unknown origin spread to a warehouse and destroyed certain property which had been stored therein by the plaintiff. Relying in part on Section 12–a, which he contended rendered the state answerable for the negligence of its officers in failing to provide fire protection to his property, plaintiff brought suit to recover the loss. In his complaint, he alleged that the state "through its authorized agent" the city of Schenectady "failed, omitted, and neglected to supply or furnish sufficient and adequate supply of water, hose, and pressure to transport the same and did not have sufficient men or apparatus to propel, control, or extinguish the fire in question," and that the damage to his property stemmed from these failures (252 App. Div. 264).

The New York Court of Claims, which had previously observed that the state "has rendered itself liable, where a private individual would be responsible" (*American Engineering Co.* v. *State of New York*), 273 N. Y. S. 843, 856), dismissed the complaint

for failure to state a cause of action. The Appellate Division affirmed. Addressing itself first to the liability of the City of Schenectady, the court observed (252 App. Div. at 265):

> The protection of all buildings in a municipality from destruction or injury by fire is for the benefit of all the inhabitants and for their relief from a common danger. The Legislature has authorized the municipalities of the State to provide fire apparatus and to supply water for the extinguishment of fires. The grant of such a power must be regarded as exclusively for public purposes and as belonging to the municipal corporation, when assumed, in its public, political or legislative character. No duty is imposed upon the municipality; a mere discretionary authority is conferred upon it. A city does not, by acting under such a statute and providing itself with the necessary equipment enter into any contract or assume any implied liability to the owners of property to furnish ways and means for the extinguishment of fires upon which an action can be maintained. No legal duty rests upon a city to supply its inhabitants with protection against fire (*Springfield Fire Ins. Co.* v. *Village of Keeseville,* 148 N. Y. 46; *Moch Co.* v. *Rensselaer Water Co.,* 237 *id.* 160).
>
> The extinguishment of fires is a function which a municipal corporation undertakes in its public, governmental capacity and in connection with which it incurs no civil liability, either for inadequacy in equipment or for the negligence of its employees. It is well settled that a municipal corporation is not responsible

> for the destruction of property within its limits by fire which it did not set, merely because although it had established a fire department, through the negligence or other default of the corporation or its employees the members of the fire department failed to extinguish the fire, whether this failure is due to an insufficient supply of water, the neglect or incompetence of the firemen or the defective condition of the fire apparatus. * * *

Examining the contention that Section 12–a had the effect of rendering the state liable for the failure to furnish adequate fire protection, the court determined that (252 App. Div. at 266):

> * * * there is no moral or legal obligation resting on the State to furnish such protection. In order to impose a liability on the State there must be an obligation on its part. The State may not assume liability where there is none. * * *
>
> If the State is obligated to protect the inhabitants of its municipalities against loss by fire then by the same token it must give like protection to all its residents including those living in isolated sections within its boundaries. It is just as reasonable, just as logical, to argue that the State must guard its citizens against the ravages of disease or protect them against crime or other like calamity or respond in damages to those aggrieved for its failure to do so. We cannot sanction such a conclusion.

The *Hughes* case did not reach the New York Court of Appeals. Eight years later (in 1945), however,

that court rendered its decision in *Steitz* v. *City of Beacon,* 295 N. Y. 51, 64 N. E. 2d 704, which as heretofore noted, was cited by this Court in Dalehite. In the *Steitz* case, as in *Hughes,* the plaintiff sought to recover for a loss of property occasioned by fire. The charter of the defendant municipality provided that the municipality "may construct and operate a system of waterworks" and "shall maintain [a] fire * * * department." Pursuant to these provisions, the city established a waterworks system for, among other purposes, that of providing fire protection. According to the allegations of plaintiff's complaint, his premises were destroyed because the city negligently failed (1) to create and maintain a fire department, including fire equipment and protection for the benefit of his and neighboring properties; and (2) to keep in repair, and to operate properly, certain valves which were part of the waterworks system, with the consequence that an insufficient quantity of water was provided to combat the fire.

On the authority of the *Hughes* case, the trial court granted the defendant's motion to dismiss the action (52 N. Y. S. 2d 813):

> [That case] would seem to state the controlling law on the present motion. Liability is sought to be predicated upon the failure of the municipality to furnish adequate and sufficient fire protection, not upon any affirmative act of the municipality through its agents or employees causing or contributing to the conflagration. No legal duty rests upon a municipality to supply its inhabitants with fire pro-

> tection, and the exercise of this power by a municipality is a governmental function for which no civil liability may be imposed.

The Appellate Division affirmed. 268 App. Div. 1008, 52 N. Y. S. 2d 788.

The Court of Appeals, in turn affirming, posed the question before it in these terms (295 N. Y. at 54–55):

> The waiver of sovereign immunity by section 8 (formerly § 12-a) of the Court of Claims Act has rendered the defendant municipality liable, equally with individuals and private corporations, for the wrongs of its officers and employees. In each case, however, liability must be "determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations." Accordingly the city is governed and controlled by the rules of legal liability applicable to an individual sued for fire damage under the circumstances alleged in the complaint. The question is *whether the facts alleged would be sufficient to constitute a cause of action against an individual under the same duties as those imposed upon the city solely because of failure to protect property from destruction by fire which was started by another.* [Emphasis added.]

The answer was this (295 N. Y. at 55–57):

> There is no such liability known to the law unless a duty to the plaintiff to quench the fire or indemnify the loss has been assumed by agreement or imposed by statute. There was no agreement in this case to put out the fire or

make good the loss, and so liability is predicated solely upon the above-quoted provisions of the city's charter defining its powers of government. *Quite obviously these provisions were not in terms designed to protect the personal interest of any individual and clearly were designed to secure the benefits of well ordered municipal government enjoyed by all members of the community.* There was indeed a public duty to maintain a fire department, but that was all, and there was no suggestion that for any omission in keeping hydrants, valves or pipes in repair the people of the city could recover fire damages to their property.

Any intention to impose upon the city the crushing burden of such an obligation should not be imputed to the Legislature in the absence of language clearly designed to have that effect. * * * As was said in *Moch Co.* v. *Rensselaer Water Co.* (247 N. Y. 160, 166), "If the plaintiff is to prevail, one who negligently omits to supply sufficient pressure to extinguish a fire started by another, assumes an obligation to pay the ensuing damage, though the whole city is laid low. A promisor will not be deemed to have had in mind the assumption of a risk so overwhelming for any trivial reward." *A fortiori* the Legislature should not be deemed to have imposed such a risk when its language connotes nothing more than the creation of departments of municipal government, the grant of essential powers of government and directions as to their exercise.

Such enactments do not import intention to protect the interests of any individual except as they secure to all members of the community

the enjoyment of rights and privileges to which they are entitled only as members of the public. Neglect in the performance of such requirements creates no civil liability to individuals (Restatement of Torts, § 228; *Moch Co.* v. *Rensselaer Water Co., supra;* * * * [Emphasis added.]

* * * * *

The case at bar is governed by our decision in the *Moch* case (*supra*).

* * * * *

It was [there] held that the action could not be maintained for a tort at common law or for a breach of statutory duty because the duty was owing to the city and not to its inhabitants and because the failure to furnish an adequate supply of water was at most the denial of a benefit and was not the commission of a wrong.

The *Moch* case is controlling here because it has judicially determined that a corporation under a positive statutory duty to furnish water for the extinguishment of fires is not rendered liable for damages caused by a fire started by another because of a breach of this statutory duty.[41]

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[41] The court's reference to Section 288 of the Restatement of the Law of Torts was especially apposite. That Section provides that the negligent failure to comply with a legislative enactment does not give rise to civil liability if the enactment was designed exclusively either "to secure to individuals the enjoyment of rights or privileges to which they are entitled only as members of the public"; or to require "the performance of a service which the state or municipality undertakes to give to the public" except where a contractual duty has been assumed "to perform a service which the state or municipality

In short, the New York courts hold that the claimant had no substantive right to recover prior to the sovereign's consent to suit, and there can therefore be no recovery after the waiver unless the sovereign clearly indicates—as the legislature did not in New York and Congress has not in the Tort Claims Act—a specific purpose to create a new substantive right against the Government. See also, *Turner* v. *United States,* 248 U. S. 354, 358, discussed in footnote 36, *supra,* p. 59.

5. In an endeavor to escape the effect of *Dalehite,* and the long line of decisions upon which its fire-fighting holding was based, petitioner points to the Court's decision in *Indian Towing Co.* v. *United States,* 350 U. S. 61. But that reliance is unwarranted. In *Indian Towing,* the Court held that a claim grounded upon alleged negligence on the part of the Coast Guard in the maintenance of a navigational aid was within the purview of the Tort Claims

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is under a legal duty to give." Cf. *Hayes* v. *Michigan Central R. Co.*, 111 U. S. 228, 240.

It is further to be noted that the result reached in the fire-fighting cases has also been reached by the New York courts in post–1929 cases involving loss sustained as a consequence of the purported failure to provide adequate police protection. See, *e. g.*, *Murrain* v. *Wilson Line, Inc.*, 270 App. Div. 372, 375, 59 N. Y. S. 2d 750, affirmed, 296 N. Y. 845, 72 N. E. 2d 29; *Schuster* v. *City of New York*, 121 N. Y. S. 2d 735, affirmed, 286 App. Div. 389, 143 N. Y. S. 2d 778. As in the fire protection cases, the rationale was not that the municipality enjoyed sovereign immunity but was, rather, that in providing fire and police services to the public at large, a municipality does not assume an actionable duty running to individual members thereof. Cf. Mr. Justice Brandeis in *Turner* v. *United States*, fn. 36, *supra*, p. 59.

Act and could ground recovery. With respect to the provision of Section 2674 that the liability imposed by the Act is "in the same manner and to the same extent as a private individual under like circumstances," the court stated that (350 U. S. at 64–65) "it is hornbook tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good Samaritan' task in a careful manner."

At the same time, the court did not disturb the *Dalehite* holding. On the contrary, the majority ruled *Dalehite* to be distinguishable (350 U. S. at 69):

> The differences between this case and *Dalehite* need not be labored. The governing factors in *Dalehite* sufficiently emerge from the opinion in that case.

In an accompanying footnote, the Court observed that in *Dalehite* the Court had:

> disposed of a claim of liability for negligence in connection with fire fighting by finding that "there is no analogous liability * * *" in the law of torts.[42] 346 U. S., at 44.

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[42] In the same footnote, the court made passing reference to *Workman* v. *New York City*, 179 U. S. 552. It might be noted, however, that the complaint in *Workman* was not grounded upon the failure to fight a fire with due care or otherwise prevent fire loss. Rather, the claim there was based on the allegedly negligent navigation of a fire boat on its way to a fire.

We have never contended that, if a Forest Service vehicle were to collide with a privately owned vehicle, because of the negligence of the Government driver, liability could not be imposed upon the United States. The Forest Service (in common with other Governmental agencies) is under the same duty in its operation of its vehicles as is the private motorist, and is liable for the

The basis for this distinction needs little further elaboration. As has been seen, Judge Cardozo, a foremost exponent of the Good Samaritan principle (cf. *Glanzer* v. *Shepard*, 233 N. Y. 236), in terms rejected the application of that principle where a private person, like the Forest Service here, undertook by contract to perform the public function of affording fire protection. *Moch* v. *Rensselaer Water Co., supra*, pp. 59–61. And, although sometimes not expressed, there was perforce the same recognition of the inapplicability of the Good Samaritan rule in the other cases which hold that states, cities, and private corporations do not—by reason of a contractual or statutory assumption of the task of providing the public with personnel, water or equipment for fire suppression—agree to assume tort liability to individuals for imperfect fulfillment of the functions of firefighting.[43]

In the final analysis, petitioner asks this Court to hold that the Tort Claims Act does much more than waive the prior sovereign immunity in tort—that, additionally, the Act represents the assumption by the Federal Government of actionable duties, and thus liabilities, which are not imposed either upon other

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negligence of its employees in this regard to the extent that a similarly situated private motorist would be held accountable. We stress again (see *supra*, pp. 53–73) that, as the New York courts have recognized in the application of the Court of Claims Act of that state, the public duty to suppress fires is of a different character.

[43] The distinction is equally applicable to the other cases upon which petitioner relies in arguing (Pet. Br. pp. 44, 62–63) that the United States may be held liable as a volunteer.

governmental units or upon private citizens. As we have pointed out, this Court, like the New York Court of Appeals with reference to that state's waiver of immunity, has refused to do so. Looking to the statutory terms, the court observed both in *Feres* and in *Dalehite* that the Tort Act has—and was intended to have—no such effect; that, instead, its effect "is to waive immunity from recognized causes of action and * * * not to visit the Government with novel and unprecedented liabilities." See pp. 50–53, *supra*. We submit that there is plainly no occasion for reading the Act otherwise in this case, and that the *Dalehite* holding should be reaffirmed.

Indeed, immunity from tort liability in the case of the firefighting activities of the Forest Service would appear to be at least as, and perhaps far more, essential than in the case of the Coast Guard, of other Federal agencies or even local governmental units. The United States owns vast national forests for the benefit of the people of this country. As petitioner's brief (p. 39) correctly states, "The Federal government owns a substantial majority of the timber and timberlands in the Pacific Northwest and a large part of the remainder of the nation's timber." We have already noted that the colossal task of the Forest Service is indicated by the fact that for the fiscal year 1953 alone, the Service controlled over 11,000 forest fires, at a cost of more than five million dollars, and spent approximately 9½ million dollars in the execution of its cooperative fire protection agreements with the state governments (*supra*, p. 46). Petitioner seeks a decision in effect extending an invitation to every commercial lumber corporation injured by fire originating on, crossing, or affecting the public domain to seek indemnity from the United States.

It may be, as petitioner argues, that the janitor or custodian of a public building who negligently attempts to put out a fire with a fire extinguisher is not a public fireman, but the analogy is entirely inapposite to the Forest Service, organized and maintained in large part for fire protection service.

The Government submits that for the efforts of the United States to preserve a great national resource for the benefit of the people of this country to be accompanied with the enormous potential liabilities which would result from acceptance of petitioner's contention would unduly amplify the existing rights of private property. Petitioner had the benefit of the firefighting services of the Forest Service which were almost, but not quite, successful in suppressing the forest fire and avoiding injury to petitioner's property. Petitioner is entitled to no more. "The law," says Dean Pound's "Introduction to the Philosophy of Law" (p. 189), "enforces the reasonable expectations arising out of conduct, relations and situations."[44] Neither petitioner nor any other commercial lumber company has had a reasonable expectation of effecting, upon the theory of this case, a recovery from the United States by reason of a forest fire negligently set by a third party.

Not only would the petitioner receive what would be in substance a windfall if the decision below is reversed, but the United States would become subject, for the first time, to potential liability of the greatest magnitude. In large part, negligent or inefficient fire-fighting has been held not to be the basis

[44] Cf. *Selected Writings of Benjamin Nathan Cardozo* (1947), p. 207.

of a private claim because the courts have recognized that to impose such liability on a municipality or other public body might well lead to the abandonment of public fire fighting activities; for instance, the potential cost for the burning of an entire town, or part of one, would be too great. In like fashion, if petitioner is sustained, the United States may be held liable for the destruction, through a forest fire, of large areas, perhaps even an entire town or city.[45] Congress might see fit to make contributions in such a case, but the law as it has been developed does not impose such liability on the United States as a matter of right.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

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[45] For example, Santa Barbara, California (with a population in 1950 of 44,913), and the surrounding area (with a total estimated population, including Santa Barbara, of 100,000) borders on the Los Padres National Forest. During 1955, a catastrophic forest fire developed in the national forest which was suppressed, at a cost to federal and state authorities of approximately $1,000,000. We are informed by the Forest Service that this fire definitely endangered the Santa Barbara area and neighboring communities, and might have spread to them if it had not been suppressed in time.

APPENDIX

1. The relevant provisions of the Federal Tort Claims Act are as follows:

28 U. S. C. 1346 (b).

Subject to the provisions of Chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

28 U. S. C. 2674.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

2. The relevant provisions of the Revised Code of Washington are as follows:

Section 4.24.040 (Revised Statutes § 5647).

Action for negligently permitting fire to spread. If any person for any lawful purpose

kindles a fire upon his own land, he shall do it at such time and in such manner, and shall take such care of it to prevent it from spreading and doing damage to other persons' property as a prudent and careful man would do, and if he fails so to do he shall be liable in an action on the case to any person suffering damage thereby to the full amount of such damage.

Section 76.04.370 (Revised Statutes § 5807).

Abatement of fire hazards—Recovery of cost. Any land in the state covered wholly or in part by inflammable debris created by logging or other forest operations, land clearing, or right-of-way clearing and which by reason of such condition is likely to further the spread of fire and thereby endanger life or property, shall constitute a fire hazard, and the owner thereof and the person responsible for its existence shall abate such hazard. If the state shall incur any expense from fire fighting made necessary by reason of such hazard, it may recover the cost thereof from the person responsible for the existence of such hazard or the owner of the land upon which such hazard existed, and the state shall have a lien upon the land therefor enforceable in the same manner and with the same effect as a mechanic's lien. Nothing in this section shall apply to land for which a certificate of clearance has been issued.

If the owner or person responsible for such hazard refuses, neglects, or fails to abate the hazard, the supervisor may summarily cause it to be abated and the cost thereof may be recovered from the owner or person responsible therefor, and shall also be a lien upon the land enforceable in the same manner with the same effect as a mechanic's lien. The summary action may be taken only after twenty days' notice in writing has been given to the owner or reputed owner of the land on which the

hazard exists either by personal service or by registered letter addressed to him at his last-known place of residence.

Section 76.04.450 (Revised Statutes § 5818).

Olympic Peninsula area protection. All forests and timber upon all land in the state, lying west of a line one mile west of the eastern boundary of range ten west of the Willamette Meridian and north of the north boundary line of Grays Harbor county, shall be protected and preserved from the fire hazard caused by reason of the unusual quantity of fallen timber upon such land. It shall be unlawful for any person to do any act which shall expose any of the forests or timber upon such land to the hazard of fire.

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